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Oral History: Justice Bernard S. Jefferson

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RETROSPECT

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Preface

The following is a transcript from a videotaped oral history of Justice Bernard S. Jefferson, formerly of the California Court of Appeal, Second District. Justice Jefferson is probably best known as one of the first black appointees to a high position in the California judiciary, and as the author of the outstanding *California Evidence Benchbook*. He is also noted for his significant rulings as a trial judge. In his early career, Justice Jefferson was involved in major civil rights actions in the company of Thurgood Marshall and other prominent black lawyers. In his later career, he served briefly as a pro tem appointee on the California Supreme Court.

This transcript examines Justice Jefferson's full career and strong opinions. The oral history and this transcript are products of the Committee on History of Law in California, a standing committee of the State Bar of California. With the publishing efforts of the *Hastings Constitutional Law Quarterly*, we are pleased to make this work available for study by historians and any other persons interested in the development of California law, the life and career of Justice Jefferson, and the landmark decisions of his era.

A primary objective of the Committee on History of Law in California is to foster the study and preservation of California's legal history. The Committee accordingly desires to make the Jefferson project, and all subsequent video oral histories, easily available to all interested scholars and students. The Committee will complete the transcript from a similar interview with Justice Otto Kaus, also to appear in a future issue of the *Hastings Constitutional Law Quarterly*. The Jefferson and Kaus projects are the first entries in "The California Bar Oral History Series," a joint effort of this Committee and California law schools.*

* The Committee on History of Law in California would like to express its thanks to the individuals and California law schools which have made this project possible. Mr. David Doyle, a member of the Committee from 1982 to 1986, researched and conducted the Jefferson interview. Mr. Doyle is a litigation attorney practicing in Fresno, California.

Biographical Sketch

Justice Bernard S. Jefferson's career has spanned half a century and earned him the reputation as one of the most brilliant legal scholars of

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The entire interview occurred on December 17, 1984 in three separate sessions of approximately two hours each. The interview occurred on the McGeorge campus, where the school maintains professional video facilities. The studio resembles an attorney's office and measures about twelve-by-twelve feet. Justice Jefferson sat at a desk near one corner of the room and looked across the desk and slightly to his left at Mr. Doyle throughout the interview. The single camera was stationary and stituated behind Mr. Doyle so Justice Jefferson would appear to look directly toward it. Mr. Doyle, Justice Jefferson, and the camera operator were usually the only individuals in the room.

The word-processing staff of California Western School of Law in San Diego prepared the transcript from the videotapes through arrangements made by Neil T. Gotanda, a former professor at California Western and a member of the Committee. Laurene Wu McClain, now chair of the Committee, compared the transcript to the tapes and edited the final product. She also submitted the transcript to Justice Jefferson for his comments and for clarifications of any inaudible or inaccurate statements. All significant differences between the videotapes and the transcript are enclosed in brackets. Ms. McClain practices law in San Francisco and teaches history at City College of San Francisco.

The editorial staff of the *Hastings Constitutional Law Quarterly* edited the submitted transcript and altered the order of the discussion. The editorial staff then submitted the edited version to Ms. McClain and Justice Jefferson for their comments.

Matthew St. George, a Committee member practicing law with the Los Angeles City Attorney's Office, wrote the introductory biographical sketch of Justice Jefferson.

The transcript and videotapes are available for research and other permitted uses. McGeorge School of Law, Hastings College of the Law, and the archives of the San Francisco offices of the State Bar of California have copies of the Jefferson videotapes for future use. The entire interview is on three VHS video cassettes; each tape is two hours in length. The State Bar of California retains all copyright interests and other literary rights in the transcript and tapes, including the right to reproduce or publish. No part of the transcript or tapes may be quoted or otherwise reproduced in any manner without express written permission of the State Bar of California. However, the *Hastings Constitutional Law Quarterly* has the exclusive right to publish the transcript for a period of three years commencing on the publication date of the issue. The *Quarterly* may grant written reprint requests provided such requests are within the "fair use" doctrine. Requests for permission to quote for publication or to reproduce any part of the works should be addressed to the *Hastings Constitutional Law Quarterly*, 200 McAllister Street, San Francisco, California 94102. Requests should identify specific passages or materials to be quoted or reproduced, anticipated uses of the passages or material, and identification of the user.

Preparing this project—from the original interview to final publication—required the energies of Committee members under three chair persons. Each Committee chair serves for one year. This project also required generous support from the McGeorge School of Law. We thank the McGeorge deans and faculty and the technical services personnel who operated the camera and made the tape. We thank Carol Hicke of the Regional Oral History Office at the University of California, Berkeley, and her former colleague, Sarah L. Sharpe, Ph.D., who shared their important advice and thoughts on preparing the final transcript for publication. We are pleased to add our thanks to the editors of the *Hastings Constitutional Law Quarterly* who accepted the task of publishing the transcript with an outlook on publishing future transcripts in the series. By carrying this responsibility, the editors have opened a law review to new possibilities for sharing critical information to a wide audience. Finally, we thank Justice

his time. Born in a small town in Mississippi, Jefferson's family moved west—first to Denver and then to Los Angeles. He confronted racial prejudice throughout these early years, including an incident in which his high school counselors discouraged him from going to college. Despite these early obstacles, Jefferson attended the University of California, Los Angeles, and eventually Harvard Law School. Following his graduation from Harvard in 1934, Jefferson accomplished a wide range of pursuits within the legal profession. From 1934 until 1946, he taught law at Howard University in Washington, D.C. During World War II, he served in the federal government as Assistant General Counsel for the Office of Price Administration. From 1946 until 1959, he engaged in general law practice in Los Angeles.

In 1959, Jefferson reluctantly accepted appointment by Governor Edmund G. Brown, Sr. to the municipal court. The next year Governor Brown elevated him to the superior court. Jefferson capped his judicial career in 1975 when Governor Edmund G. Brown, Jr. appointed him to the court of appeal. Justice Jefferson also served briefly as a justice pro tem of the California Supreme Court. From just one week of hearings, he participated in decisions written over a two year period. Jefferson wrote several crucial opinions and gained direct insight into the character of Supreme Court justices and the political forces they confront.

While serving as a jurist, he issued several decisions establishing new law in several fields. One such decision was *Greater Westchester Homeowners Association v. City of Los Angeles*,[1] which held the city liable for emotional distress that neighboring residents suffered from airport noise. In *Drummond v. General Motors Corp.*,[2] he rendered a controversial opinion on manufacturers' liability for defectively designed products. In *Serrano v. Priest*,[3] he challenged methods for funding public schools. Many of his decisions, issued at the trial level, were affirmed by higher

Bernard S. Jefferson for consenting to the interview and for patiently working with us to preserve his important perspectives on the evolution of California legal history.

THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA
Laurene Wu McClain, Chair, 1986-1987
Kenneth D. Crews, Chair, 1985-1986
Christian G. Fritz, Chair, 1984-1985

1. 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980). *See also infra* text accompanying notes 23-25.

2. No. 771-098 (Cal. Super. Ct., L.A. County July 29, 1966). *See also infra* text accompanying note 22.

3. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977). *See* Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (upholding attorney fee award based on a "private attorney general" rationale); *see also infra* text accompanying notes 49-51.

courts and became landmark rulings. Yet, Justice Jefferson may be best known among practicing attorneys as the author of the *California Evidence Benchbook*.[4] Now in its second edition, the text is a standard treatise for California lawyers.

One of the most interesting and unusual episodes in Jefferson's career was the controversy surrounding his appointment as presiding justice of Division One for the Court of Appeal, Second District, in 1979. Taking advantage of the temporary absence from California of Democratic Governor Edmund G. Brown, Jr., the Republican Lieutenant Governor Mike Curb named Superior Court Judge Armand Arabian to the vacant presiding justice position. Upon Governor Brown's return to the state, he named Jefferson as his choice for the post. The California Supreme Court resolved the conflict by endorsing the Lieutenant Governor's authority during the Governor's absence from the state, but also recognizing the Governor's power to withdraw and replace a nomination pending before the Commission on Judicial Appointments.[5]

In 1980, Jefferson joined the faculty of the University of West Los Angeles School of Law, and in 1982, he became president of that institution. Justice Jefferson remains an active jurist by special appointment to certain cases, and he lectures frequently on evidence and other legal subjects.

I. Family Background, Childhood, and Reflections on Education

Doyle: Justice Jefferson, can you describe your immediate family?
Jefferson: My immediate family consists of my wife, Betty, and two children—a son, Roland, and a daughter, Cassandra. My son, a psychiatrist, is married and has four children. My daughter is not married.

I also have two brothers and a sister. There were four children and they're all alive. One brother, Edwin, is a retired justice of the court of appeal who was a judge on the municipal court, superior court, and the court of appeal in all for thirty-two years before retirement. I have a brother, Ronald, who lives in Chicago. He is a pediatrician. I have a sister, Ruby, who lives here in Los Angeles who is a retired elementary school teacher. My mother and father are both now deceased.
Doyle: Could you describe when you were born, your parents, and your ancestry?

4. B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK (2d ed. 1982). *See also infra* p. 258.

5. *In re* Governorship, 26 Cal. 3d 110, 603 P.2d 1357, 160 Cal. Rptr. 760 (1979).

Jefferson: I was born in Mississippi, in a little town called Coffeeville. I don't think it's on the map anymore, if it ever happened to be on the map. But it was somewhere between Jackson, Mississippi, the capital, which was in the southern part going from there up north; maybe it was somewhere in the middle of the state. It was just a little town called Coffeeville and I have some recollections of it. From living there my folks moved to another place in Mississippi called Holly Springs. Holly Springs is a town which was in the northern part of Mississippi because it was about sixty miles from Memphis, Tennessee.

My father was a carpenter, probably with a fourth or fifth grade education. My mother, however, had gone to what was called normal school. I would suppose it would be equated with high school or a little bit better. She taught in the local elementary school and actually she was my first teacher in Coffeeville. My dad, being a carpenter and from a little town, his life was spent in traveling all around the state working for various construction companies.

The move to Holly Springs was basically to try to better the educational opportunities. Coffeeville had nothing to offer except in the sense of the separate black school with probably one teacher or two; I have very little recollection of Coffeeville. In Holly Springs, however, there was a school called Rust College, founded, I think, by the Methodists. Most of the teachers were white. In other words, you might say they were missionaries who went into the South in such a school in an effort to give some educational background to the blacks. And although it was called a college, it had an elementary school so I actually went to college as a youngster so to speak. But I have fond recollections of Rust College and taking piano, for example, from a music teacher at the college. All in all, it was an interesting experience although we didn't stay there too long.

Doyle: Where did you go after Mississippi?

Jefferson: We moved from Holly Springs to Denver. You might be interested in why we moved. After my dad had moved around so much, he and my mother decided to settle down where he could be home more. My father was inclined to say, "Well, why don't we buy a farm and stay here in Mississippi." But the story goes that my mother said, "No, these four children of ours are not going to get any education in Mississippi, so we better move on elsewhere." My father had some friends who had gone to Denver from Mississippi, and he wrote [them], and they wrote back and said, "Why don't you come to Denver?" In the meantime, he also had some friends who had come out to Los Angeles. So the decision

was made to go to Denver. That would have been about 1919, I suppose, so in other words, I would have been about nine years of age.

We moved to Denver, and lo and behold, he discovered that Denver, because of its cold climate, all of its houses are brick and there isn't that much work for a carpenter. So that was kind of a disastrous experience for two years in Denver because the work was scarce. Then he wrote to his friends in Los Angeles and they said, "There's plenty of carpentry work out here because the houses are frame stucco, so that means that even the stucco houses allow carpentry work." We then came to Los Angeles. It would have been about 1921.

Doyle: Do you have any recollection of your early childhood experiences in Mississippi or Denver?

Jefferson: Mainly, in Mississippi. It's where I first came into contact with the unpleasantness of racial prejudice. As a youngster, I remember having to get off the sidewalk because that's what I was told to do when a white couple would be coming down the street. And I remember some experiences of white youngsters chasing me home from school. Those were, you might say, the real bad-tasting experiences of racial prejudice. And I can remember, for example, in going to school, I went down a street and there was a very crippled young white boy who would be there, and he would throw out his crutch in an effort to strike me. And, of course, I always dodged [it]; I wasn't about to get into any fight with anybody. But those were the kind of things I remember, especially in Coffeeville. I don't seem to remember too much about what happened in Holly Springs of that nature.

The same segregated pattern of life was in Denver, though. I remember they had a community swimming pool inside because of the cold weather. Well, they set aside days, such as on Thursdays, when blacks could go into the city's swimming pool and gym. I always worked, maybe all of us did to try to help out the family, so I remember selling the newspaper called the *Denver Post* and getting used to that cold weather—my hands, fingers, feeling like they were going to freeze off because the weather was so cold. But I enjoyed the experience of working, even as a youngster doing that. I recollect that I would have gone to elementary school for two years in Denver. I don't have too much recollection of it. There was no segregation so far as the school was concerned. You went to the neighborhood school although most blacks, of course, lived in a particular section of the city. But I had no unpleasant experiences at all as far as the school was concerned.

Doyle: What was Los Angeles like in the 1920's when you arrived?

Jefferson: It was a small community and I would say with a population well under a million. About five high schools in those days made up the city school system. Junior highs were just about beginning because I ended up going to Manual Arts High School, which was one of the five. I guess I went in 1924 because I came out in 1927. And, of course, in those days, there were not too many cars. The street car was the mode of transportation. If you were going into other communities such as Long Beach they used to have what they called the Red Car Line run by Southern Pacific, still in effect a streetcar.

But Los Angeles in those days was still a segregated community in the sense that most of the blacks lived in the east side of the city, a few on the west side. My folks settled on the west side. But there was not discrimination in the sense that you could go to a theater and sit anywhere you wanted to. You could go to restaurants, but the restaurant owners in those days had quite a system. The black couple came in; they would generally be seated near the kitchen. In other words they had an area there. They wouldn't say so, but anybody who was black knew exactly why you were being seated there. So that was the system.

They did some gerrymandering of the school system. For example, we lived within walking distance of Manual Arts High School. Most of the blacks went to Jefferson High which is way on the east side, and I would say that probably Jefferson High in those days would be sixty percent white and forty percent black. At Manual, where I went, there was only a handful of blacks. If we had a graduating class of 500, there wouldn't have been over five or six blacks. Both of my brothers had gone to Manual, but when I got ready to go, they had done some gerrymandering, and I was supposed to go to Jefferson—which meant taking the streetcar, a thirty minute ride across town. My mother had to get a special permit in order for me to go to Manual, telling them of course, "He's had two brothers go there and he's within walking distance," and so we got the permit and so I went to Manual. There were a few blacks who attended some of the other schools, but just a handful.

Doyle: What experiences do you remember from going to Manual Arts High School in Los Angeles?

Jefferson: I have told this many times. When I went to register, the vice principal was the counselor for the students—they didn't have special counselors. So he asked, "What kind of course do you want to take?" I said I wanted to take college preparatory. And he said, "You ought not to take that. You ought to take a shop course; your people won't do well trying to go to college." His name was C.P. Fonda; I've never forgotten it. So I said, "Mr. Fonda, I'm going to take the college preparatory

course. I'll be here four years and I'll come back in four years and I want you to note when I come back as to where I stand in the class." Well, I was a top student in my class so I had the chance to go back and tell him. I said, "You may not remember, but four years ago when I started, you told me my people did not do well; therefore, you advised against going into a college preparatory program. Now that I'm the valedictorian of the class I hope that you won't give that advice to any other blacks." So he said, "Well, I apologize and I'm happy to see you've done so well." That's a vivid recollection of the attitude of the school administrators in those days.

But my own experience at Manual was a very enjoyable one although we only had a handful of blacks. I belonged to the Debating Club and the Oratorical Society, was the Commencement speaker, belonged to the Chess Club, belonged to the ROTC Band, [and] played in the orchestra. In other words, I had good participation from the standpoint of extra-curricular activities. There was no prejudice shown in that regard.

Doyle: Did you find that the educational philosophy where blacks were being sent to certain areas changed as time went by.

Jefferson: It took a long time and it hadn't changed by the time my own children came along. My son, for example, went to Los Angeles High, because we had moved, and we were closer to Los Angeles High. I had to go over to talk with the counselors, and the counselors said, "Well, you know your son ought not to be thinking about college. He should go into some field of shop work or other activity." And I said, "Is this the kind of advice you've been giving other blacks, too?" So we had quite a heated run-in. I never did get back to point out what happened to him. He went on to U.S.C. [University of Southern California], majored in Anthropology, went on to medicine, and then took the work to become a psychiatrist. But that [type of discrimination] was still going on.

I remember back in those days I was working for the Urban League and I can't recall the details, but the school board had a session in which I had to make the point there that I thought the school board ought to look into what the counselors were doing in the various schools. I felt very strongly that they were doing exactly what they had been doing for years, which was trying to shunt all blacks over to nonacademic work. But I think that philosophy has changed, at least I hope so, but I haven't been in touch with it in recent years.

Doyle: Where did you go to college and what type of experience did you have there?

Jefferson: I went to U.C.L.A. [University of California, Los Angeles]. At that time it was on Vermont Avenue, not in Westwood where it is now; it was called Southern Branch. But after two years there, it moved to Westwood. The time spent at U.C.L.A. was equally as enjoyable as my high school experience. I majored in Political Science and minored in Economics. In those days U.C.L.A. did not have any graduate programs: it was strictly a bachelor's program. But they had, of course, large classes and I became what they called a reader, a grader that assisted the instructors in the big classes. Again, I participated in the extra-curricular activities, was on the Debating Team, in oratorical contests, and the school band. I was fortunate enough to be elected to Phi Beta Kappa in my junior year and was picked as one of the three candidates from U.C.L.A. in an effort to get a Rhodes Scholarship. But I knew I wasn't going to get anywhere with that because I didn't have the athletic background at all. As a matter of fact, I decided that maybe if I could get some athletics somewhere, I would have a better chance to get a Rhodes Scholarship. So I went out for track, but the track coach soon realized that I had no business being there. He put me in a two mile and I came in last, and then I hung up the spikes and decided that athletics was not for me. I suppose in those days I weighed only about 115 pounds and was five feet, nine and one-half inches tall, so you can see I was simply a beanpole. I really had no interest in athletics anyway and I only tried that to see whether it would push my chances, but it didn't.

Doyle: Do you think that athletics are overly emphasized in school today, especially in the black community?

Jefferson: Yes, I would think so, and, of course, there's a reason for it. It's because of the development in professional athletics that has given blacks with ability, that is, with athletic ability, an opportunity to become secure and earn money that otherwise they could never earn. I think part of that is the American concept of paying, to me, a much greater deference and worship to those with athletic ability, and [to] the movie people, so that the blacks who are able to get in there have been able to earn salaries which they would have no possibility of earning otherwise.

I think that's a fault of the American society. For example, the pay for school teachers—they've got to go through and get a college degree—it might be only twelve, fourteen, or fifteen thousand a year; now maybe it's higher. For example, Chicago's school teachers' strike has just ended and I have been told that their salaries were in the area of $15,000. And those are people who've gotten the B.A. degree and maybe beyond. So

that's what we think of education. That's what we're willing to pay our money to support.

I heard the other day the criticism, I guess, of the American Medical Association recommending that boxing be terminated because of the danger to people engaged in it, because of what has happened to some of our boxers. And yet, some have said, granting it's a dangerous sport, it gives some minorities an opportunity to achieve something that they could never achieve otherwise. They might be a janitor or they might be practically nothing, but at least boxing gives them a chance, so why should they be denied that opportunity.

Getting back to the original question, yes, I think we overemphasize athletics. But as long as the American public wants to worship athletics, and to pay out the money that would permit people in athletics to make decent salaries, then I suppose any parent who has a child, say a black parent who has a child who has any athletic ability, is going to push that because it will at least offer a good opportunity for a good earning capacity. Now, probably on the overall basis, there are many that go for it and don't make it. But at least as long as a certain number are going to get these phenomenal salaries, then we're going to have parents pushing their children into athletics. Putting a football, a basketball into their hands before they can walk, even, in the hopes that maybe they'll become a star.

Doyle: As an experienced educator, do you think the educational system today is failing to provide students with an adequate education?

Jefferson: That's a tough question to answer. The inability to recognize the school teachers and pay them decent salaries means that the educational system is not drawing the high quality of teachers that ought to be drawn. It seems to me that, on the whole, our school systems are left with not having the choice of picking those who have the greatest capacity to be good teachers. With the business world offering what it offers, the question could be asked, "Why would one want to go into teaching?"

And then of course, we have a problem—I'm looking at it from a racial standpoint—of what has happened in the neighborhood school which is a part of the pattern of segregated living. The school boards will not put most of the money where it ought to go for the minority schools where there isn't the backing of parents, because of the financial situations of black parents generally. But, for example, to say that in a school system you must have a schoolroom of thirty to thirty-five students, well that's fine where you have a neighborhood where there's a lot of backing at home, but to put thirty students who come from minority homes in a schoolroom, and you don't have the very best teachers there, and parents

lend very little support, then that child is not going to receive much of an education.

Then we have a whole system of requiring that students be graduated at a certain age, with the result that you have students going into college who cannot read, graduating from high school and they can't read, can't spell, and the colleges do the same thing. I see students in law school who cannot spell and who cannot write a decent paragraph. I think maybe some of it also is that we have encouraged moving away from the basics. I don't know whether television or radio has anything to do with it; but somehow, in elementary schools and in high schools, there is not a strong emphasis on reading, writing, and arithmetic, so to speak.

I think back to the days when I was in high school and had to write papers in almost every subject. We had to go to the library and study. Grammar was important and taught, and I think we've gotten away from that. Everything now seems to me to be looking towards training persons in what they might do, whether it is nursing, secretarial work, or what have you. And I just think that the school systems are simply failing when they somehow are graduating people without the basic skills in English, writing, and arithmetic. Maybe now you punch a computer or punch the adding machine, and you don't need to know how to add by hand.

I think there's an answer to all this. We need to improve the salaries and working conditions in teaching and then there needs to be a better distribution of funds so that people who need superior teaching ought to have it. But what school district, for example, is going to say, "Well, we'll put enough money so [that] if we're in a neighborhood where the children need to be limited to fifteen to a class, we'll have enough teachers so that that's all they'll be teaching." I don't know of any school district throughout the state that would be that enlightened.

II. Legal Education, Teaching, and Practicing Law

A. Studying Law at Harvard Law School

Doyle: Why did you choose to go to Harvard Law School?
Jefferson: Well, let me tell you why I even decided to go into law. As I was going through high school and then got into college, I had the idea I wanted to be a teacher. But then I studied the Los Angeles School District. I was thinking that there were no black high school teachers in any of the high schools, few elementary. I think we had one elementary school principal. Then I got to thinking, suppose I go into college teaching. I felt if I did that I'd have to go south and teach in the all-black

colleges. I still wouldn't get a chance to teach at U.C.L.A. or U.S.C. or any of those schools.

By that time my brother decided to go into law and he went to U.S.C., so I said, "Well, I'll have to give up my idea of teaching. I'll study law and at least be my own boss. Whether I make any money or not, nobody will be telling me 'You don't have a job' or 'You can't work here.' " Once I'd decided I would go into law, I said, "I'm going to pick the law school that I think is the best in the country." There were, at that time, two black lawyers in Los Angeles who were from Harvard. You might say the old timers. I don't know when they graduated but they were good lawyers: Willis O'Tyler and Hugh McBeth. I had seen them perform, and I said, "Well, I'm going to Harvard." So that's how I happened to go.

Doyle: What was Harvard like?

Jefferson: To me, it was a wonderful experience because in those days the giants of legal writing and legal teaching were at Harvard. So I studied under [Samuel] Williston who wrote a treatise on contracts,[6] [Austin] Scott who wrote a treatise on trusts,[7] and various [people] like that. In those days, the students really revered those scholars. That was just the whole attitude; you had reverence for that brightness of mind. And yet, Harvard still is and was then, a big school. We must have had something like 600-700 in our first year class. But they frankly told you—they didn't have LSAT in those days—if you had a bachelor's degree from a fairly decent school, then you could get in.

I'll always remember just about the first time they got the whole class together, the dean said, "We have the open door policy at Harvard. Experience tells us, look to the man to your left, look to the man to your right, and see the door there; at the end of the first year one of you three will go out that door, not to return." Now of course, those were the days when all of those schools didn't allow women, so my whole class was nothing but men, 650 males. Again, there were two blacks out of that class; one was Asian-American.

We had our fiftieth reunion last year, and it was interesting to see that when you walk through the campus you saw about fifty percent females, well, maybe not quite that high, but to show you the difference. Yale was the same way, and they've all now changed. Law was practically all male back in those days.

Just to have studied under those scholars was to me an experience I could never forget. But, by the same token, I'll tell this little anecdote, if

6. S. WILLISTON, LAW OF CONTRACTS (1st ed. 1920).
7. A. SCOTT, LAW OF TRUSTS (1st ed. 1939).

you want to call it that, that happened back at our reunion. The dean was talking about what was happening now in the law school—that everybody was striving to be on the top in the first year, because that's when the big law firms would begin to pick their people, and that if one got picked, he didn't have to worry too much about what happened thereafter; you know he could kind of slide through. So, they had several of us talk about our experiences the first year at Harvard. I stated that I did not have that problem of being at the top in the first year in order to try to be placed in a good law firm in New York or Philadelphia, or what have you, because I knew it didn't make a bit of difference. I could graduate number one and I still wouldn't be considered. So while all of my classmates may have been struggling to see where they were going to go as to a clerkship, I just went merrily along, studying law, enjoying it, trying to do the best I could, but without having the worry of whether I was going to go to a big law firm as a clerk. Everybody at the reunion got a big kick out of that story.

B. Teaching at Howard University and Working as a Government Attorney During the 1930's and 1940's

Doyle: After leaving Harvard, did you go into education?
Jefferson: Yes, [although] I had no intentions of doing it as a career. I planned when I graduated to return to Los Angeles and practice law, but there was a teacher from Howard University School of Law in Washington, D.C. who was getting his doctorate degree while I was getting my law degree, bachelor's in law in those days. He talked with me and said that the dean of Howard Law School was upgrading Howard Law School into a first rate law school because it was the only school that many southern blacks could go to, because they couldn't go to the state law schools. What the southern states would do was give blacks scholarships and send them up to Howard, out of state. So he said he received a letter from the dean at Howard who asked him if there were any black graduating seniors who might want to come down and teach a year because the dean wanted to send off another teacher to do graduate work. And so he said, "Would you be interested?" I said, "Oh, I don't know, I might, I'd have to talk with him." So, one day the dean from Howard came up and talked with me about what my plans were. I said, "Well, I'm going back to Los Angeles, I'll take the bar in August." That's when they gave it, and I was planning to practice. So he said, "Well, if you take it in August, when will you hear?" I said, "Oh, around December." So he said, "Well, I'd like to have you come and teach a year if you would." So I said I'd think about it. I thought about it and said for a certain amount of time I won't be doing anything anyway—I was wait-

ing for the bar results—so I said, "Okay, I'll come down and teach." And he said, "Well, do you still plan to go and take the bar?" I said, "Yeah." So he said, "Gee, I wish you wouldn't do that because if you're going to teach, suppose you don't pass it." I said, "Well, that's the gamble you'll have to take because I'm not going to wait; I feel that I know more now generally in law than I will at any other time, so you'll just have to take that chance if you want me to teach." So he said, "Okay, go ahead then." So I took it and passed it and I was there teaching when the results came out in December. So that's how I happened to go to Howard and teach there at the law school.

Howard Law School had gotten approval—A.B.A. approval—and belonged to the American Association of Law Schools. The dean's name was Charles Houston. He was the one who really organized the NAACP Defense Fund that took on cases like *Brown v. Board of Education*.[8] That was an interesting experience when I was at Howard, because Thurgood Marshall, who later went on to the Supreme Court, graduated from Howard in 1934, which is the same year I graduated from Harvard. I met him because he was still working there in Washington, and I got to know him. They had assembled a small core of teachers, about five, full-time at Howard, and one of their main interests, you might say, was to figure out a way to attack the segregated system. A lot of time was spent in research and developing the theories of how to break down the legal backing of segregation and all of its aspects. I think I'm right, it was one of the first schools that organized a course called Civil Rights. And that was one of the interesting aspects of being a teacher at Howard.

Once I got there, I decided I was going to stay in teaching initially. So I took a sabbatical leave in 1941 and went back to Harvard to get my doctor degree in law. That's when World War II broke out, while I was there. And, of course, the law school just fell apart. There weren't many students to begin with—the whole student body was about seventy-five, about twenty-five to a class. They switched from a day to a night [program] and some of the teachers I had known when I was working on my doctorate came down to Washington and went into the governmental service, so they asked me, "Why don't you come on and join us and work as a government attorney." So I did that and was with the Office of Price Administration as an assistant general counsel.

Doyle: When you were at Howard, what was Washington, D.C. like?

Jefferson: Washington, D.C. was an exciting place in the sense that it was the seat of the government. But it was, as it was located in the South, as segregated a system as you'd find. The school systems were

8. 347 U.S. 483 (1954). *See also infra* notes 39, 45 & 60 and accompanying text.

completely separate; black system of administration all the way down—black teachers in elementary school to high school—all black. A separate white system. Blacks could ride on the street cars, you didn't have to sit in back. However, blacks couldn't go to movies, you had to have separate black movie houses. Blacks couldn't go to restaurants. So it was just a complete segregated system.

Doyle: What was Thurgood Marshall like in his youth?

Jefferson: I don't remember too much now. I kept in some contact with him, but you see, he had been schooled under the developing group fighting for civil rights. Now the teacher who was up at Harvard getting his graduate degree when I was there was William Hastie. He went back to Howard and became the dean but then he ended up being appointed the first black circuit court judge. He stumped for [Harry] Truman. And when Truman got elected, he put him on, I think, the court of appeals in the Philadelphia area; I don't remember what circuit he was on. He was the one who had taught Thurgood Marshall, and so they grew up with the view that there has to be a way to legally attack the segregated system.

Talking about that at Howard, we used to talk about the so-called restrictive covenants. Of course, when we moved to Los Angeles, my people moved in an area on the west side; we didn't think about that. It was just a little frame house, but it had a restrictive covenant. So here comes a law suit to evict us and this lawyer I was telling you about, Willis O'Tyler,[9] represented my parents—I don't know whether there were any others or not—but he won that lawsuit on the ground that the restrictive covenant provided that it should not be effective unless all of the homeowners agreed. It just happened that there was one homeowner that had not agreed. So he was able to knock it out on the ground that it never became effective, but there were many restrictive covenants that were effective. It was illegal to sell, and it was illegal to buy, from the standpoint of any nonwhite. Blacks went into the courts and the courts would enforce the covenant. The courts did not consider their decisions to be state action. The courts said that they were not enforcing segregated neighborhoods; they were merely enforcing a private contract, and a private contract doesn't constitute state action. So what we used to talk about was how we could get the courts to see that the courts' action wasn't different from a city council passing an ordinance saying that all blacks can't live in a certain area of the city. The city council's action is state action without any question. Well, when the courts step in and enforce something, is that not state action?

9. *See supra* p. 236.

But, of course, as long as you had the mood of the country in a conservative attitude, we didn't get anywhere with it, but ultimately the whole theory and concept of what constitutes state action began to expand. So that at some point, finally, the courts said, yes, whenever the court enforces even a private contract, that's state action.[10] Therefore, if the contract is one which if enacted by a legislature or city council would violate the Fourteenth Amendment, then the court's approval of a private contract would also violate the Fourteenth Amendment. But there were things like that that the teachers at Howard talked about and tried to figure ways to get courts to expand their concept of the Constitution.

Doyle: Do you have any experiences you remember from working in the Office of Price Administration during World War II—it must have been somewhat strange to have a black attorney as counsel for a governmental agency in those days.

Jefferson: Yes, it was kind of unique except that once the war got under way, the war agencies, like the Office of Price Administration, did begin to hire a few black attorneys, whereas the old line agencies did not, such as Agriculture, for example. We were dealing with the matter of passing regulations and writing regulations that dealt with price control. We had what we called regional offices like most federal governmental agencies. There was a regional office in Dallas, one out here in Los Angeles, and also one in San Francisco.

One day the head of the division in Dallas wanted to see me about a regulation or some matter. One of my colleagues had suggested to him that the best time to see me was in the executive lunchroom, so that we could discuss business over lunch. The Dallas lawyer said, "Is that the only way I could see him?" And my colleague said, "Well, what's wrong with that?" The Dallas lawyer said, "Look, I'm from the South and I understand that Jefferson is black and I've never sat at a table eating a meal with a black." So my friend said, "Well, look, if you want an answer to your question, you have to get it from him. There's only one way you can get it; you're going to have your first experience of sitting down and eating with a black." Well, of course, the next day the Dallas lawyer and I had lunch and nothing happened. I was immune because I didn't ever let on that I knew what had gone on before. I just had a hunch that there were a lot of them who, you might say, were from the South and who had that kind of experience and prejudice and yet who overcame it.

On the other hand, you know it's differen[t] in individuals. When I was doing graduate work, there was a chap from Oklahoma, a white

10. Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Barrows v. Jackson, 346 U.S. 249, 254 (1953).

fellow, who was getting a master's [degree] and we became close friends. He and his wife were there and invited us over to dinner in his apartment just as if nothing had happened. I frequently thought—suppose we had transferred and all this was going on in Oklahoma City. He might have felt he couldn't have carried on that personal relationship.

We know now that in the South how it's changed so that once the barriers start breaking down, people will come to see that maybe we're all human and there are good and bad in all of us.

C. Practicing Law in Los Angeles After World War II

Doyle: After working as counsel for the Price Administration, what did you decide to do after the war was over?

Jefferson: I decided to return to Los Angeles to practice law. I had thought about going back into teaching, but somehow after I had stopped and worked for the government for several years, I decided I would go back and get into the private practice of law.

Doyle: What was Los Angeles like following World War II?

Jefferson: Well, it was beginning to grow with the shipbuilding and the other industries that developed in California, and the many soldiers from the East passing through. So it began to grow at an astronomical pace more or less. And perhaps it suffered growing pains, but there seemed to be a lot more activity. It was getting out of being a good old country town sprawled out and was beginning to really develop something not necessarily unique, but an attempt to have uniqueness.

Doyle: Were minorities better off in Los Angeles after the war than before?

Jefferson: It was still in the '50's and there still were problems of employment. I had decided to work for the Los Angeles Urban League as a volunteer, and I thought we had a pretty good organization. One of the reasons I started working with them was because I could see deficiences in employment. For example, there were no teachers as such, there were no black clerks in the department stores, blacks were not hired to drive the buses or streetcars, and you had an interesting phenomenon that the federal government in terms of the Post Office Department hired many, many blacks, and we used to say that there were more Ph.D.'s and M.A.'s among blacks working in the post office than anyplace else. And the reason was simply that although they were educated, received those degrees, they couldn't get jobs. I remember when we went to the department stores as an Urban League and said, "Why don't you have black clerks?" The answer, almost universally, by each department store, such as Bullocks, May Company, Broadway, was: "Well, we wouldn't have

any objections but we think our customers won't go for that. That they just won't buy." Or one would say, "We'll do it if one of the others will." But somehow we kept working on it and finally the department stores did proceed to hire blacks and in the same way we finally persuaded the Rapid Transit District to start hiring blacks, and in that way employment began to pick up.

Doyle: How did the Urban League differ from the NAACP?

Jefferson: Well, I would say that the NAACP—the National Association for the Advancement of Colored People—was an organization which would get involved in law suits. So their main thrust would be to change things through a lawsuit, whereas the Urban League worked in terms of what I would call a mediation. In other words, they would seek to persuade industry that it was in the best interest of industry to adopt a policy of fair employment practices. That was the way the Urban League worked. Of course, it had on its board a large number of members of all races who felt that by working together you could get some advancement. At times, if you wanted to give it a description, people would say that the NAACP was the War Department and the Urban League was the State Department.

Doyle: How long were you in private practice and what type of law did you practice when you came back to Los Angeles?

Jefferson: I was in practice for about ten years, and I was more or less a sole practitioner, engaged in general practice, handling some probate, some administrative law work, some personal injury, some criminal cases—just a little bit of everything. In my opinion, that really equipped me for the bench in a pretty good fashion, by having had the experience in just about all the various fields of law.

Doyle: What was the practice of law like for black attorneys in the 1940's and 1950's?

Jefferson: I would say it was rather limited and we saw the effect of the whole segregated system. For example, the black attorneys had to compete for clients not only with other black attorneys but [with] white [lawyers], Jewish lawyers, Italian [lawyers]; and part of that was the result of a feeling among the black population that since the court system was pretty much white—the judge was white, the juries would be white—if they were going to win a case or succeed, they'd better have a white lawyer rather than a black lawyer. So in I would say most cases, if a black lawyer is on one side, it would seldom happen that another black lawyer would be on the other side. Although I suppose in the divorce actions you might have two black attorneys, one representing the wife and one representing the husband, but generally speaking there was that feeling. And of course, black lawyers would complain with each other

about why is it we are not only faced with competition for business among our own, but with everybody else?

Then there was a feeling—and I think it was borne out—that many of the judges felt that black lawyers were not deserving of the same treatment. I'm now referring to fees. If you were in probate, there was the feeling that the judges would award the black attorneys a lesser sum than they would a white attorney handling the same type of case. I think as I recall, committees talked to the presiding judges in Los Angeles County about that in an effort to change it, and I think it might have had some effect.

Doyle: What was the reaction and attitude of the judiciary and the court system toward black attorneys in general?

Jefferson: I would say that there was this feeling of prejudice somewhat. I got the impression that in many instances the judges felt that, well, maybe the black lawyers were not as well-equipped as the others and didn't deserve the same amount of respect. That wouldn't be true of all judges, obviously, but I think it was true of some. Then on the other hand, in the criminal field, when a black defendant charged with murder would be represented by a black attorney, this was the one situation perhaps where the party in the system felt he was going to get a better break. It was my own personal feeling that there were some judges that took the attitude that, "Well, here's a black who's killed [a] black; it doesn't make any difference, so let's give the defense lawyer a break and instead of first degree murder, let the defendant off the hook or give him a lower sentence." That seemed to happen with some of the judges and it was a very unfortunate thing. I feel that it had to be overcome, and I think with the change in the judiciary and newer judges coming in, that that attitude did change. In the black community it certainly was a terrible feeling by people that as long as one black killed another, then it didn't make any difference; therefore, the defendant ought not necessarily be punished as severely as if it's an interracial killing.

Doyle: What was the attitude of the bar associations towards minority attorneys during the 1940's and 1950's?

Jefferson: Well, to me that's a black mark against the bar of this country. The Los Angeles Bar had a provision in its constitution that refused to admit black attorneys. The A.B.A. was the same way. The blacks, of course, had to form their own bar associations. In Los Angeles, for example, we had the Langston Bar Association and that name is from a black lawyer well past the Civil War days who had made quite a reputation in the East. But that was quite removed from the Los Angeles County Bar. I don't remember the year, but it was a struggle because the

bar association was similar to other private groups who wanted to preserve their organization in terms of being simply a private group, and for a while they simply would not consider that even though it's a private organization, it's really a public group, in a sense, made up of lawyers. Perhaps the general thinking was at one time that the bar was being entirely too elitist in its thinking. Over the years I know that many lawyers not belonging to the large firms felt that the whole bar, the State Bar, was controlled by a few big firms who were not interested in giving representation to minorities or those from smaller firms. It's only been in recent years that I think this idea has been attacked with some success so that you now do have on the State Bar a Board of Governors with lawyers from smaller firms and individual practitioners. At one time, the personal injury lawyer didn't have a chance of becoming a member of the Board of Governors, because that was looked down upon by the big firms who were engaged primarily in commercial and corporate practice. That's changing and has changed.

Doyle: So you would not agree with Justice [William] Douglas who wouldn't have anything to do with bar associations during his time?

Jefferson: Well, I wasn't aware of what Justice Douglas' attitude was, but, of course, there are those, a number of prominent whites I would say, who refused to take part in bar activities, refused to belong to the Los Angeles County Bar, for example, because of its racist policies. But to me, one gains more if you can get on the inside and fight prejudice once you're on the inside rather than taking a standoffish attitude, and so I was glad to be able to join the American Bar Association and the Los Angeles County Bar. I haven't been as active as I would like because I've done so many other things, but still in my way of thinking, you change attitudes if you get to talk with people and let them know face to face what you think and how you feel. I think that has been the way that some change in thinking on the part of leaders of the bar has taken place.

III. Appointments as Judge

Doyle: Justice Jefferson, could you explain why you decided to apply to be a judge, and please trace your career as a judge from your appointment to the municipal court in 1960 to your retirement from the appellate court?

Jefferson: I wasn't expecting to be a judge at all and it was purely happenstance. In late 1959 I got a telephone call from one of the black leaders of the community who was president of an insurance company. He said, "What do you think about becoming a judge?" I said, "Well, I haven't given it a thought. I don't think I can; my brother is already on

the bench." So he said, "Well, I'll tell you what's happening." He said, "Governor Pat Brown wants to make a black appointment before the end of '59. And there are two political groups—one supporting one person and one supporting another. The groups are at each other's throats." So the Governor asked, "Well, can't you find somebody who is noncontroversial, who isn't involved in politics?" He said, "Yes, I know an individual, I'll talk with him about it." So, he reported back to the Governor that I might be interested.

Then I got a call from the Governor one day, asking me to come to his office to talk with him. When I talked with him, I said, "Yes, I would be interested, but I would be interested only in a superior court appointment." I said, "I have too much background to be on the municipal court. And I can't see myself trying traffic cases for the rest of my life." So he said, "Well, I don't have a vacancy on the superior court. There is one vacancy and I have promised it to someone." He said, "But I tell you, I can't put it in writing, but this is what I will do. I would like to have you take this appointment, and I promise that I will elevate you for the first superior court vacancy. Now you'll have to trust me." So, I said, "Well, let me think it over for a few days." So I talked it over with a lot of people and said, "Well, do you think the Governor means what he says?" The man who initially contacted me, said, "I believe he is sincere. But, of course, it's a gamble that you will have to take." So I called the Governor's office back and said, yes, with [the] understanding that he would elevate me on the first vacancy, I would accept the municipal court [appointment]. That was the latter part of December. I think on about the fifteenth of January, I'd been able to clear things up enough to take the oath.

I stayed on the municipal court until the middle of May. It was about four months, and a judge, who was out of Los Angeles and the superior court but sitting in Long Beach, named Joseph Maltby, died. So the first thing that came into my mind was, "I wonder if the Governor's going to carry out his promise?" I didn't call him, however; I said, "Well I'll just wait and see." In a day or two a fellow named Bill Rosenthal, I think was his name, had been a legislator and had been appointed to the municipal court after me, came by my chambers. He said, "I understand you're going to be elevated to the superior court." I said, "Where did you get that information?" He said, "Well, I went to the Governor and told him I wanted it, and the Governor said, 'No, I've already promised it to Justice Jefferson and I'm going to give it to him.' " So sure enough, the next day the Governor called and asked me to come

by his office. He said, "Well, I made a promise to you and now I am keeping it."

A lot of people wondered how in the world did you sit only four months on the municipal court and get elevated so fast. I didn't say anything until years later. I said, "Oh, I don't know." Well, that was my experience getting to be a judge.

Doyle: How were you elevated to the court of appeal?

Jefferson: I was elevated to the court of appeal by Governor Jerry Brown, the son of Pat Brown, and that came as a surprise again because my brother then had been elevated to the appellate court so I didn't give it a thought that two brothers would be named—especially two minority members. But I got a call one day from the Governor's legal secretary who said that the Governor was getting to make appointments to the appellate court and that I ought to be among those considered. This was Tony Klein, who was the Governor's legal affairs secretary at that time. He said, "I'd like to make an appointment for you to come up and talk to the Governor." And I said, "All right, make it; whatever date is okay." He said, "He's interested in finding out who knows how to write. I know you've got your *Benchbook* but what about a memorandum of opinions as a trial judge?" I said, "Well, I've got every one that I ever wrote." So he said, "Well, pick out some of the ones that you deem better and then come on up and talk to the Governor."

So he made the appointment, and I came up here to Sacramento and met with the Governor, and I guess we must've talked for about three hours. It was close to noon, and we went to about three o'clock just talking about general things, not particularly the bench but philosophy of life in general. He said, "All right, I'll let you know within time. There are several people I've got under consideration." I said, "Fine," and back to Los Angeles I went.

I guess about a week went by and then I got a call from Chief Justice Don Wright whom I knew, and he said, "Congratulations." I said, "For what?" He said, "You've been appointed to the appellate court." I said, "I have?" He said, "Oh, I guess I'm speaking out of turn but the Governor's office said." I said, "Well, I haven't heard anything from the Governor." So he said, "Well, okay, I won't say anything and don't you say anything either until you get some official word." In a couple of days here came the call through from the Governor's office. That's how I went to the appellate court.

Doyle: What were your impressions of Jerry Brown and what do you recall from that three hour conversation that you had with him?

Jefferson: Well, pretty much he had expressed the kind of philosophy that he became known for about his idea of government. One of the things I remember he was saying, "Well, maybe our expectations are too great and maybe it's time to curb back and slow down on our expectations of what life should be like, how we should be, the money we ought to be making."

But we just roamed so far and wide that I don't have any particular recollection now of all the things we did talk about. Probably the legal system and what were its faults and how could they be improved. One of the things he said, for example: "You know I'm interested in changing the legal system, or at least changing the judiciary in the sense of putting on more minorities and women. I think it's time and that's what I plan to be doing." And that he did.

Doyle: What do you think of the changes that he made in the judiciary?

Jefferson: Well, I've had a lot of people approach me and say, for example, "Well, look, he's ruining the judiciary. He's not putting on the right people." And I said, "Maybe you can point to a few who do not seem to be well equipped, but as I see it, he is doing just as well in making appointments as any other Governor."

Now one thing that is happening that has not happened in the past, lawyers are being appointed to the bench—minority and women—who are younger and maybe the reason for that is that in recent years you have been able to get the number of blacks out into the field as lawyers, and the number of women, because of course you have the minimum five years for a municipal court and ten years for superior court. [Governor Brown,] there's no doubt, does not quite have the pool, in terms of wanting to appoint minorities and women, that would exist for males. But as I see it, in terms of production I see no difference in the quality of judges. They have less experience, but if you're interested also in the philosophy of life, maybe it's better if we have some younger people. Maybe it's better if we have some minorities rather than to have the tried and true leaders of the bar appointed to the bench when they are about ready to retire from practice. They've made their fortunes, now they want a soft spot to retire on. I'm not sure that's a better system. If you can find and tell me of an incompetent judge appointed by Brown, I'll tell you one who was appointed by Reagan.

Doyle: Describe the time and nature of your service on the California Supreme Court as a pro tem judge.

Jefferson: Well, I served as a pro tem judge in about eighteen cases. Actually, I sat basically one week in which those eighteen cases were heard. But the decisions were not rendered for a period maybe of two

years; it took that long for all of them to be decided. A lot of people may have thought that I was sitting pro tem for a full two years because of the way that those cases came out here and there. But my recollection now is my pro tem term occurred about when, I think, [Marshall] McComb might have no longer been with the court. So the court was sitting in Los Angeles, and the chief justice asked if I would sit and take part in about eighteen cases.

IV. Exemplary Decisions in which Justice Jefferson Wrote the Court Opinion, and Changes He Helped Effect

A. *People v. Caudillo*

Doyle: You authored an opinion while you were on the court, called *People v. Caudillo*.[11] Could you explain what that case was about and try to explain the strong public reaction that came about due to that case? *Jefferson*: *People v. Caudillo* was a case in which the defendant had been tried and convicted of rape. And the law, as I recall it, at that time provided that if in the process of committing a rape, a defendant commits great bodily injury upon the victim, then that becomes a basis for an enhanced sentence which makes a sentence greater than if it's a rape without commission of great bodily injury.[12] And the issue that was before the court was an interpretation of that statutory provision in the Penal Code that says "great bodily injury." After the case was argued, I think there were five that initially had taken the view that there was doubt as to whether there was great bodily injury in this case. In other words, the issue developed: does the very act of rape itself constitute great bodily injury? I was assigned to write the opinion. When I say I was assigned, the chief justice asked me, "Would you like to write the opinion?" I said, "Yes." So what I did was to trace the history of the legislation and that phraseology that's used in other Penal Code sections to determine what was meant by great bodily injury. I was convinced that the history of the legislation and the legislative intent was such that great bodily injury required something more than the act of rape itself; that there had to be some substantial physical injury to the individual, and that was not true in this case.

Now, the way decisions are written and developed when a draft is written, is that it's circulated to all of the justices and there may be suggestions of changes or there may not be, but at any rate there were five

11. 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

12. CAL. PENAL CODE § 264 (West 1967), *modified by* CAL. PENAL CODE § 264.1 (West Supp. 1986).

members of the court that agreed with my ultimate draft of the opinion, and there were two who wrote dissenting opinions, not separately, I think, together—I don't know if it was Clark or Richardson. I believe Justice Richardson wrote the dissent and he had Justice Clark agreeing with him on it. And then Chief Justice [Rose Bird] wrote a concurring opinion. At the time that she submitted a draft of [her] concurring opinion, I told her, "Well, you don't have to do this if there are some things you want to say that I have not said in [my draft] opinion, [and] you agree with the result. I'd be only too happy to add it, and I think the rest of the court will go along with it." But she said, "No." She thought she wanted to write the concurring opinion. That she did.

Well, I guess the hue and cry that developed, I realized, was an article written by a man by the name of Hirsch, I think—I don't know his first name—in a magazine called *New West*.[13] It was an attack upon the chief justice because of her concurring opinion. What appeared to me to be unfair was that if it had to be an attack that the opinion was wrong, then it should have been against me because I wrote the opinion, plus against the whole court, other than Clark and Richardson. But, no, the article might have mentioned that I wrote the opinion, but the whole article was against Rose Bird for her concurring opinion, and I don't recall that she said too much more than that rape's an awful crime, but still all the court can do is interpret legislation, and the legislation simply did not permit a finding that the act of rape itself constituted great bodily injury. And if the legislature wanted to change the law, then it was free to do so. But to me it was just a case where a writer decided he was going to use that vehicle to criticize her and at least from the article, I didn't get the criticism at all. That's what a writer may do, of course. I suppose even if she had not written a concurring opinion, if the writer wanted to, he could have said, "Well, why did you concur in the opinion? Why didn't you join in the dissent?" It's easy enough to criticize somebody if you want to do so. And I think that a lot of people made up their mind they wanted to go after her and they used that vehicle of her concurring opinion to subject her, in my opinion, to unjust criticism.

B. *Curlender v. Bio-Science Laboratories*

Doyle: You've been accused of being a "judicial activist" yourself on a number of occasions and one that I'd like to recall to mind and have you comment on is the case of *Curlender v. Bio-Science Laboratories*.[14] In the opinion, you wrote:

13. J. Kirsh, *Rose Bird and the Politics of Rape*, NEW WEST, July 31, 1978, at 28.
14. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

> Despite the cool reception accorded such "wrongful-life" litigation, both parents and their children have continued to seek redress for the wrongs committed, presumably for a number of reasons: (1) the serious nature of the wrong; (2) increasing sophistication as to the causes, which may not with present knowledge be attributed to the fine hand of providence but rather to lack of care; and (3) the understanding that the law reflects, perhaps later than sooner, basic changes in the way society views such matters.[15]

Jefferson: The *Curlender* case that you referred to was one of the most progressive issues that I have had to handle and my greatest disappointment in our present California Supreme Court. In that particular case we dealt with [a situation in which] parents go to a doctor, or in this case a lab, and say, "We think we carry a strain called Tay-Sachs disease." Jews from Eastern Europe possibly carry that strain, and it's admitted that people who have it will have a child that is born with a life span of maybe less than ten years with untold pain and agony, going blind and all sorts of ills. "We want to have a child but we don't want to have a child if we carry this strain; we'll have such a deformed child." The defendant, the biochem lab, negligently examined them and came out with the conclusion, "No, you don't carry the strain." So they had a child, and they did carry it, and the child was born deformed, under a lot of pain and suffering. Prior cases—we didn't have any in California—talked about what they call "wrongful life," that one should claim that they shouldn't have been born.[16] Well, how can you value damages as to when you shouldn't have been born. So I took the view in *Curlender* that if a defendant, such as this lab or doctor, negligently diagnosed the condition of the parents so that that negligent diagnosis resulted in the birth of a defective child, that, in my opinion, considering how we in tort law had said that one is responsible for his foreseeable results in being negligent, the child, even though it has a short life span, ought to have a cause of action against the defendant for the pain and suffering that it was enduring. The defendants in that case sought review by the California Supreme Court and couldn't get the votes. It takes four votes to grant a hearing so that meant my decision stood.

But a couple of years later, along comes a similar case up in Fresno and in a two-to-one decision of the court of appeal there, they went the opposite way and said, "Well, we don't believe that a child ought to be able to get any general damages for pain and suffering."[17] Now, the

15. *Id.* at 827, 165 Cal. Rptr. at 487.

16. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 141 (1968); Durrer v. St. Michaels Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

17. *See* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

plaintiffs in that case had petitioned the supreme court for a hearing, and the hearing was granted, and then the California Supreme Court adopted the view of that court rather than the view that I had espoused.[18] Now that resulted because the personnel of the supreme court had changed. Now you had Otto Kaus, who came up from our division in Los Angeles, and I don't know who else. Well, now you had a four-to-three [decision] against *Curlender*, all because of a change in the make-up of the supreme court. I recognized as an appellate judge that the supreme court had the right to change the law, but it just seems to me that they indicated a lack of the kind of foresight that existed in the days of Traynor, Tobriner, and Sullivan. If they had been on that court, I don't have any doubt that *Curlender* would have stayed the law. But that's the way the ball bounces, and when you begin getting change in the court make-up, you're going to get change in the law. Now, I don't object to that because if it works the other way, I would say I would like to see a liberal court adopt my views.

I just say that *Curlender* is a case I was quite proud of and I was sorry to see it go down the drain ultimately. And it went down the drain in a very strange way. Maybe to get the votes, what Justice Kaus did was to say, "Well, we won't allow a child to have any actions for general damages, but you can for special damages which is the payment of hospital bills and medical [bills]."[19] To me, that just didn't make any sense at all. They should have said, "Well, just no recovery." But I guess maybe they couldn't get four votes for that so they got four for the middle ground that said no recovery for pain and suffering by the child, but the special damages.

One other thing happened in that case before that, by a footnote in *Curlender*. I even by way of dictum—I admitted it was dictum because the child wasn't suing his parents—I said a child in this case ought to be able to sue his parents, if the parents knew.[20] I said, "Let's assume we have a case where the parents know that they carry a strain, and if they have a child born, that child's going to be defective and suffer." I said a child ought to be able to sue his own parents in that kind of a case. Well, that got people and the legislature so worked up that they passed a statute almost the moment that decision came out that no child ought to be able to sue his parents for that kind of an injury.[21] But, you know, it's a difference—it all depends on how you view things.

18. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
19. *Id.* at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.
20. *Curlender*, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.
21. CAL. CIV. CODE § 43.6 (West 1982).

C. *Drummond v. General Motors Corp.*

Doyle: Let's discuss a couple of other cases you've been involved in. Could you explain your involvment and the significance of *Drummond v. General Motors Corp.*?[22]

Jefferson: Yes, I was the trial judge who decided *Drummond v. General Motors*. That case was at a time when the law of strict products liability for defective design [of] a product was beginning to develop in which you don't have to prove negligence, but if a manufacturer produces a product which creates unreasonable risk of harm and of injury, the manufacturer can be made liable without there being any negligence. And at that time, let's see, General Motors had put out the first car with an engine in the back, similar to the Volkswagen, which was the Corvair. And people were beginning to claim that the Corvair was defective in design, that it was too heavy for that rear engine as contrasted with the lighter VW which has the rear engine. So there were a number of suits pending, what we call single car accidents—people claim they went to make a curve and turned over or they made a quick turn at a reasonable rate of speed and the car would flip over.

In this particular case, the driver was a young man on a curve somewhere near the northern part of California, I can't remember the exact spot. He was on a curve and the car flipped over, so the suit was on the basis that there was a defective design of the Corvair. There was evidence, though, that he was speeding, for example, so it was a highly contested matter. But what happened was the plaintiff's lawyer had a number of these cases pending, and they were waiting for one to go to trial.

I thought we were going to have a jury case, we were getting ready to impanel a jury for a long trial, and the plaintiff and his attorney decided that they wanted to waive jury and make it a test case as to whether the Corvair was defectively designed or not. So I guess that case took close to six months to try because they threw everything in it—experts on both sides, a number of experts. I tried it in the biggest courtroom we had in Los Angeles and it almost looked like a second-hand automobile repair shop, because they had all of these exhibits and parts of automobiles. There were a lot of unknown factors, I mean of unknown issues of law as to who had the burden of proof, what had to be established for a car to be defective in design, any number of issues that were involved. When all of the evidence was in—I guess it took about four or five months—I took it under submission and studied the tran-

22. No. 771-098 (Cal. Super. Ct., L.A. County July 29, 1966) (memorandum disposition).

script, we had a daily transcript, for the next two months, and then I wrote a long opinion—I guess it must have been about a hundred pages—in which I found that there had not been proof that the Corvair was defectively designed. I think what happened was they first appealed and then they decided they would settle. So the appellate court never got to decide whether I was right or wrong.

It became kind of—because of the opinion I wrote—a lead case dealing with the issue of an automobile being defectively designed, I suppose, just as a matter of interest, all over the world. We had calls for that opinion in almost every country—Japan, Germany, everywhere. Of course, General Motors is partly responsible; they were happy about it so they just spread that decision all around. I remember I got a letter from Judge Lester Roth on our appellate court and he said, "Well, General Motors is attaching your opinion as part of its brief in every case now that deals with products liability, and of course, we read it and I just want to tell you how I enjoyed your approach and the way that you handled it. That was the *Drummond* Case.

D. The *Greater Westchester* Cases

Doyle: I guess you weren't as dieharded a liberal as people made you out to be. What was the reaction of the City of Los Angeles to what was known as the "*Greater Westchester*"[23] cases?

Jefferson: Well, there again, you might say I plowed in new fields. The *Greater Westchester* cases [were lawsuits] against the Los Angeles International Airport, which is, in effect, the City of Los Angeles, because it owns the airport. Those cases arose out of the fact that the airport opened, I don't know how many years ago, what they called the new north runway. Before they developed the new north runway, all the runways had been south runways. But the approach to this north runway was right over Westchester, and the City bought certain numbers of parcels, because it felt the noise level would be such that it would interfere with people living there. But some felt that they didn't buy enough—and this was [because of] the development of the jet aircraft and jet noise. It didn't buy all of the property so the people who still had property left decided to sue the City on the grounds that the operation of the aircraft in landing and takeoff over their property was a nuisance and created physical and mental harm and anguish. In that case, the question was

23. Greater Westchester Homeowners Ass'n v. City of Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980).

whether or not the City could be held [liable] on a nuisance theory.[24] In that case, I decided that noise was at the level that it was a nuisance.

I visited the people and would stand in the homes and see what they could hear while the aircraft was coming over. There were a lot of defenses which the City raised, what we call federal preemption, that since the federal statutes, Congress, and aviation authority regulates the take-off and landing patterns, that the City wouldn't be liable. But the net result was that after I rendered my decision on it, I advised the City—I had a number of cases—that it might take the issue up on appeal and see whether I'm right although the amount of damages at stake was not that great. The City appealed, and I think it went all the way to the U.S. Supreme Court, but the appellate courts upheld my decision, the California Supreme Court upheld it, and the Supreme Court of the United States refused to take it over so that [it] became a new law that the City could be held liable on a nuisance theory. That's what's known as the *Greater Westchester* cases.

E. *Daly v. General Motors Corp.*

Doyle: In *Daly v. General Motors Corp.*[25] you pointed out that the majority of states are convinced that jurors will be able to compare noncomparables—plaintiffs' negligence with defendants' strict liability for a defective product—and still reach a fair apportionment of liability. You considered the majority conclusion a case of wishful thinking and an application of an impractical, ivory tower approach. What was *Daly* about and what was your criticism about?

Jefferson: That was the case of an accident. I don't remember all of the details, but the suit against General Motors was predicated not on a negligent construction of any part of the automobile, but was based upon strict liability of an unsafe product. What happened was, in addition, I think the plaintiff who had maybe a one-car accident was pretty much dead drunk. But he claimed that his injuries were basically the result of this defective automobile. And I don't recall now what the defect was, but there was no showing that General Motors was negligent in any way, but the California Supreme Court had recently said that a plaintiff's contributory negligence would no longer be a bar to a recovery against a defendant whose negligence concurs with the plaintiff's negligence to produce the injury, and that we would have a system of comparative

24. The case dealt with whether the property owners were entitled to recover for physical and mental injury when the City, without condemning their property, made it uninhabitable. *Id.* at 91-92, 603 P.2d at 1330-31, 160 Cal. Rptr. at 734.

25. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

negligence;[26] so that if a plaintiff's injury resulted in, let's say, $100,000 in total damages, if the jury were to assess comparative fault, they might decide that the plaintiff was seventy-five percent negligent and the defendant was twenty-five percent negligent, in which case you'd subtract seventy-five percent. If there's $100,000 in damages, you'd subtract $75,000, give the plaintiff $25,000 because even though he was seventy-five percent negligent, he wasn't one hundred percent [at fault]. In that way you kind of apportion the damages by using comparative negligence to reduce the amount of injury rather than barring the plaintiff completely.

Then along came *Daly* where [the] plaintiff's theory of liability against the defendant was based on strict liability, which has nothing to do with negligence, and yet part of the injury was caused by virtue of the plaintiff's negligence. Can the jury assess the injury in terms of saying the plaintiff is twenty-five percent at fault and the defendant is seventy-five percent at fault?

I maintain that since the theory of liability, strict liability, is completely different from negligence, that to tell the jury you are to determine what percentage of the plaintiff's damages [was] due to his negligence and what percentage was due to the defendant's strict liability in tort, was asking the jury to do an impossible task.[27] And I still think that the result is unsound. In other words, all the jury would do if they feel the plaintiff is at fault because he was negligent, is take something off the award. But to say that they can realistically compare negligence with strict liability is a meaningless task.

I think in the long run what the court felt was that a plaintiff in the situation of this plaintiff, who was pretty much dead drunk, just shouldn't be able to recover completely all of his damages from the defendant. This is a situation where I think hard cases make bad law. That was the wrong type of case to go before the supreme court on the question—can you or should you apply comparative negligence when the plaintiff is seeking to recover against the defendant in strict liability.

F. Cameras in the Courtroom

Doyle: You served as the Judicial Council Chairperson for the Special Committee on Courts and the Media. Maybe it is appropriate since we're interviewing you here, what do you think of cameras in the courtroom?

26. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

27. *Daly*, 20 Cal. 3d at 751, 575 P.2d at 1178, 144 Cal. Rptr. at 395 (Jefferson, J., concurring in part and dissenting in part).

Jefferson: Well, I chaired that Committee, appointed by Chief Justice [Rose Bird] to develop a pilot program on the use of the media and the courtroom, that is, the use of television and radio. We had a broad spectrum of members on that Committee—judges, people from media, print media, television, trial judges, people representing groups such as the League of Women Voters. There were a large number.

What we were seeking to develop was to see if we could work out a pilot program of the use of media in the courtroom. A number of states were beginning to develop that way, Florida, for example, Colorado. The objections made by people were, well, it's going to affect the results in a courtroom if the judge knows he's in the light of television or the lawyers know, jurors know, but we said, "Well, let's try it." And so we set up rules, such as you had to have the consent of the judge, there could only be one camera, it had to be placed in a particular spot, and if there were going to be different stations there'd have to be a pooling arrangement. The main thing was to see to it there was not an undue interference with the proceedings. Then we recommended hiring a group that would make a study to see whether the cameras in the courtroom did affect the proceedings in terms of the truth finding idea.

The result was the experiment was carried on, I think, for two years and now it's become permanent. What it does, a judge still has discretion to say in a particular circumstance, "I don't think this particular trial ought to be televised." But the main thing was the defendant would not have an absolute right to say whether he would or would not want television. As far as I know, it's now working successfully and the fears of people that everybody would act, so that it would be merely a show rather than a true court conduct, haven't been realized as far as I can see. I think the judges have been cautious in the way they handle whether the media should go into the courtroom.

V. Departure from the Appellate Bench

Doyle: Can you relate why you had to leave the appellate bench and the circumstances surrounding that?

Jefferson: It was purely an economic thing. Under the retirement law,[28] if you don't retire at least one day before you reach your seventieth birthday, then there's a radical change in your retirement benefits. If you've served twenty years on the bench, and retire the day before you get to seventy, you can retire and get seventy-five percent of your salary, and then if you die after retirement then your widow will get one-half of the

28. CAL. GOV'T CODE §§ 75075-75079 (West 1982).

seventy-five percent for the rest of her life. If you don't retire by seventy and then you later die in office or you retire subsequently, your pension drops to fifty percent of your salary and the widow's benefits are zero. So unless a judge is independently wealthy so that you don't look at your salary as necessary income, you more or less feel that you have to retire in order to protect your widow. So that's why I retired and I'm sure that's why Don Wright got off, Sullivan in 1969, and most judges are required to do that.

Now a lawsuit was filed to try to declare that retirement law unconstitutional on the ground that it favored the rich as against the poor, but the law was upheld here recently by a court of appeal in San Francisco,[29] and the supreme court didn't take it over so it is still in existence, unless and until a new law is passed. Just a few months before I had to retire, the California Trial Lawyers had sponsored an amendment to the Constitution which I guess it would have—no, I think it could have been a statutory amendment—that would have said you don't have to retire until you're seventy-five, but I was told that Governor Brown was dead set against it because that would leave too many people on he didn't want to see stay on, or something like that, and so the author of the bill just withdrew it after the Governor's office was against it. Every Governor has been against that type of legislation, and all I can say is it's all political, because we now have the system of the Performance Commission, so that if a judge, regardless of what age, is not performing properly, he can be removed. [The reason] they said they wanted to have it was, even though it was economically slanted, they had no way of getting a judge off of the bench, so he'd stay on to get his salary, even if he was no longer capable of doing the job. But once this Performance Commission which could recommend removal existed, it was no longer needed to have any economic benefits upon an early retirement. But one of these days it may well happen that you get a Governor who's not interested in appointments, I don't know when, and if so, then would be willing to see legislation go through to permit a judge whose mental faculties and physical faculties are still sound to stay on.

Doyle: So I can assume that the irony of fighting all these years for racial equality was not lost on you when you were forced to step down from the bench due to age discrimination?

Jefferson: So, discrimination of one kind or another is still with us.

29. Rittenband v. Cory, 159 Cal. App. 3d 410, 205 Cal. Rptr. 576 (1984).

VI. Justice Jefferson as Author

Doyle: How did your expertise in the area of evidence develop that ultimately led to your authoring the *Evidence Benchbook*?[30]

Jefferson: For some reason that I cannot explain, I fell in love with the subject of evidence in law school. To the extent that we were using the professor's casebook, rather than just reading the cases I would go and read the footnote cases, I just liked to read about evidence. So one day in class the professor asked a question, and we all were sitting in numbered seats in a great big semi-circular classroom so he started at the end and went right on down and nobody seemed to know, and then he hit me, and I told him the answer and that it's found in '*Jones v. Smith*' and cited in a footnote on page so and so. He looked surprised, he said, "By jove, I've asked that question in every class for several years and nobody has come up with the answer until you did today. You know what that tells me?" I said, "No, what?" He said, "We need to write a new casebook." So from that point I have just always had an interest in the law of evidence.

Now, my reason for writing the *Benchbook* developed because I became one of the founders of the California Judges' College which holds a two week session each summer for the training of the new judges who have been appointed over the past year. We selected various subjects and I became teacher of the evidence course. So what I did was to start developing a series of hypothetical cases that was used to teach. After several years there was a judge on our bench in Los Angeles Superior Court, Bill Levitt was his name, and we talked about developing for the college a series of bench books just for judges' use. And he said, "You've done a lot of work on evidence, why don't you undertake that?" I said, "Yeah, I think so." So I started then trying to determine a format and then we got to the question of let's see who we'll get who'll be interested in publishing it; we've got to find that out before we go too far, so we talked to West Publishing and it didn't seem to be interested; then we talked to Dorothy Nelson who at that time was dean of U.S.C. and head of what is called the Governing Committee of Continuing Education of the Bar. Of course, they publish books. She said she'd take it up with the Governing Committee and they came back and said yes, if I would then consider that I was writing a book both for judges and lawyers. I said, "Yeah, maybe that'd be a good idea. Both sides of the profession use the same text." So that's how it developed. So then I really went to work on it with intensity.

30. B. JEFFERSON, *supra* note 4.

Doyle: As you may recall, you wrote an article in the *Harvard Law Review* in November of 1944 which related to declarations against interest, an exception to the hearsay rule, and you wrote:

> [D]etermining the scope of the exception was largely a matter of finding some case which had held such evidence admissible. Thus the scope of an exception was more likely to be determined by some casual, arbitrary, or accidental circumstance involved in an early case than by an inquiry into a theory of distinguishing some hearsay from that generally excluded.[31]

We seem to have in the public's mind a very haphazard system of excluding evidence. Why don't we just give all the evidence to the jury and let them make the decision?

Jefferson: Well, you've gone back to that article. Let me indicate how that article happened to be written. That is an excerpt from my doctoral dissertation when I went back to Harvard when I thought I was going to stay in teaching—in 1941, 1942—and that became the subject of my doctoral dissertation. So what you quoted from is an excerpt. They asked if I would cut it down and make it into an article for the *Law Review*.

The reasons that we just don't let any or all forms of evidence go to the jury are basically two things, I suppose. One is that we look at trials as a truth finding function. That being so, we need to try to develop procedures by which the truth finding function can be carried out. Remembering that juries know nothing about the facts, they have to determine the facts from what they hear. And I suppose over the years that experience and logic have dictated that people tend to be influenced by some things more than others, and if you allowed just any kind of evidence to go before a jury they might very easily be influenced to decide a case by what they heard which might have little relevancy to the facts in the case. For example, you keep out unduly prejudicial evidence even though it is relevant.[32] And one of the instances is this matter of a witness' credibility being impeached by conviction of a felony.[33] Well, if a criminal defendant is on trial for possession of narcotics, and if it's shown that he's been convicted of murder, a lot of people on the jury might say, "Well, we can't bother about what the judge tells us that we're to use this conviction solely to attack credibility. If this guy's a criminal five years ago, he's probably still a criminal. So why don't we just go on and convict him and don't worry about this evidence because once a criminal, always a criminal."

31. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 1 (1944).

32. *See* CAL. EVID. CODE § 352 (West 1982); FED. R. EVID. 403.

33. *See* CAL. EVID. CODE §§ 787, 788 (West 1982); FED. R. EVID. 404(b).

Now, that's one aspect. In terms of what we call the hearsay rule, that aspect of excluding hearsay really developed historically because we do have the adversary jury system. The theory of permitting a jury to decide facts is that you give them the type of evidence that they are going to be able to determine between witness "A" saying one thing and witness "B" saying another. Well, now what do you present to a jury that permits them to say, "We think witness A ought to be believed rather than witness B." There are several things. One is that a witness is before the court. The jury can see his demeanor when he testifies: is he smiling? Does he wait ten seconds before he answers each question? In the cross-examination, is his story consistent? Does he come out with inconsistent statements? Those are the kinds of things that help determine credibility.

Now, we exclude hearsay because the hearsay rule basically excludes evidence of what we call a hearsay declarant, a person who saw something but isn't in court to tell what he saw. The witness in court is someone who merely heard the observer say "I saw this accident" or "I saw this crime." And no amount of cross-examination of the witness in court who merely heard another person say what that person saw, can give the jury any idea about whether or not he had the opportunity to observe what he was supposed to have observed. And for that reason, we say that hearsay is unreliable. Unreliable, because at the time the person talks about what he saw, he is not under oath, and he is not subject to cross-examination.

Now, for any consistent system of evidence and hearsay evidence, when we say that some hearsay is more reliable than others, there should be consideration of two factors. One, necessity. If a witness can be put on the stand, then you shouldn't let the jury hear what he said at some other time. There's no necessity for it. The second is if there's a necessity because the person is sick, dead, or otherwise out of the jurisdiction, and, therefore, unable to testify. Then is there some indicia of trustworthiness or reliability to his hearsay statement? And in the absence of those two things, you don't have a good system of evidence going before a jury.

We don't have the two elements in all of the hearsay exceptions. Some of them have just one of these elements. The exceptions developed when our law of evidence started changing from the common law. We had the Model Code developed by the American Law Institute,[34] and then we had the Uniform Rules,[35] and they created many of these exceptions because they were historical, and so now we live with them, but if

34. MODEL CODE OF EVIDENCE (1942).

35. UNIFORM RULES OF EVIDENCE, 13A U.L.A. (1986) (first adopted 1974).

we had to do it all over, I'd say we would start by cutting out some of them that we now have.

VII. Observations on the Legal Community and the Practice of Law Today

A. Attitudes Towards Black Lawyers

Doyle: To what extent do you think the attitude of white lawyers has changed toward blacks and other minority lawyers in recent years?
Jefferson: I think now the bars are beginning to be more democratic in their way of thinking so that the attitude of white lawyers has changed. For example, they now see blacks who are judges and therefore they recognize that ability is not dependent upon one's race or color or ethnic background, so that I believe more and more the idea that one should be judged on one's qualifications is becoming more prominent. I don't say that it's completely changed. I sometimes wonder if the big law firms that have hired minority members have done so as merely a show of appearance rather than any real belief. I'm not sure that any of the big law firms yet have recognized that they ought to give a minority member, such as a black or an Asian or a Chicano, an opportunity to become a full partner. But I do know that there are a few blacks in the big law firms now. But not enough where one can say that it indicates that there's no longer any prejudice.
Doyle: Has the attitude of blacks changed towards black attorneys over the years? Do they feel the need to be represented by white attorneys?
Jefferson: That attitude is changing so that I now feel that there is a greater acceptance of the principle that if the black party has a black lawyer representing him, the party's going to get good service and do well in the courts. Now part of that also comes about because we do now have a sprinkling of black judges throughout the state. Since the black community knows that, I think it is now a feeling that, "I can be just as well off with the black attorney and maybe I'm better off, especially if I land in a courtroom with a black judge. Maybe the judge might be thinking, 'Why didn't you get a black attorney? Didn't you think any of them were capable of handling your case?' " So I think that has had a backlash effect, which is good, to indicate that a black can be well represented in court by a black.

Now there's another side of it and that's the question: To what extent do black attorneys draw and develop white clients? That is slowly developing, but as I see it, there is not much of that. Some, but I think the white community still does not see the black attorney as one who can represent him as well. But as time goes on and as more large firms will

develop and have black lawyers, then I think that the possibility of drawing on the white clients will happen. Now there are companies, for example, that do have black lawyers as in-house counsel and some fairly good size corporations here and there have also taken on black attorneys as in-house counsel.

B. The Issue of Attorney Competency

Doyle: Do you think clients tend to be more or less satisfied with their counsel today than they were in the past when you were practicing law?
Jefferson: I think there's less satisfaction. You're getting into the whole area that we see developing now of a universal distrust of lawyers and I think one of the indications of that is we see a lot more of malpractice lawsuits against lawyers. Back in the '40's and '50's it was almost unheard of for lawyers to be sued on a malpractice basis. First, I think the doctors started the thing by being the recipients of malpractice suits, but once that got under way people are beginning to look to any adverse result by their own counsel as maybe having to do with negligence and lack of knowledge, so that I think there is just a general trend that the average person now looks at any bad result and wants to have some redress. Of course, if he loses a lawsuit, then the person to look to for redress is going to be his counsel. I guess it's difficult to say how widespread that is, but my own belief is that there's just been this development in our society that no one wants to take responsibility for what goes wrong in his life, and if he can hold somebody else responsible, then he'll try to do so, so that then the lawyer can become a target if he loses a case.
Doyle: There's been much criticism, including from the [former] Chief Justice of the [United States] Supreme Court, regarding the lack of skills of attorneys,[36] which probably has contributed to some of the attitudes that some people have toward their counsel. Do you believe that attorneys today are less skilled than they were in the past when you took up the practice of law?
Jefferson: I recall, I think, several years ago [former] Chief Justice Burger created quite a stir when he made the charge that he felt a large percentage of lawyers were trying cases that they were incompetent to try. I take issue with him on that. Of course, I think he mainly may have been talking about the federal court system and maybe in places other than California. My experience over the years and as a trial judge, and as you know I was a trial judge for fifteen years, has been that the

36. *See* Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980).

lawyers that appeared before me have been competent. There's of course a range of competency. There are those who, you might say, are the top of the class, and then there are those who are average, but there are very few instances that I have seen that lawyers came in, and I would end up saying, "Well, that lawyer ought never to have been in a courtroom."

Somehow, I think that Burger got off on a point that none of us knows the answer to, and that is: Is there any way that you can train law students so that when they graduate and walk out of the law school they can immediately go into court and try a good case? And I don't think we have the answer to that. We know of course the doctors, when they get their degrees, work in hospitals and they have this internship and then the residency, so that by the time they are ready to accept private patients, they have gotten a pretty good experience in the practice of medicine. But we simply don't have that in law and I don't know how we can really accomplish it.

Law schools now, of course, try to have the clinical programs, and maybe all of them do have clinical programs, but that clinical program doesn't help them actually try a case. They can learn a lot maybe in terms of being able to talk to a client and advise a client initially, but when it comes to trying a case somehow that has got to be developed after one is out of law school. Even though we have the program that students can work under a lawyer and get some limited training, I think sometimes we ought to have an intermediate trial court system of cases that are very small in terms of amount, where law students can try some jury cases with smaller juries and really develop some skill that way, but I don't know if that could work. Maybe the client has to suffer at times if the client has a lawyer with his first jury case and he's struggling to make a go of it. That's a little tough, but everybody has to have a first experience, and I just don't know how you can avoid that. I don't see that the lawyers today are any better equipped or any less equipped. I think all along, the law schools are generally doing a good job in teaching the substantive law and that is what the law school is suited for, and that once a person passes the bar and gets into practice that confidence has to come through experience.

Doyle: When you were a judge, did you ever feel that it was your duty or did you ever help out the struggling attorney that was trying to try his case?

Jefferson: Yes, and among the judges we used to have quite a difference of opinion expressed. Some judges feel if a lawyer is struggling and the client has a good case, he shouldn't just let that case go down the drain without at least trying to show some signs of how to help the lawyer. But

there are others who say the position of the judge is simply to referee and if the client has chosen a poor lawyer, even though he has a good case, it has to go down the drain. I used to try to occupy a middle ground. I tried all through the years, you might say, to be a teaching judge. I would not necessarily help a lawyer win a case, but if I could help him in getting some better techniques or understanding of how to try a case, I would do so. And if I knew a lawyer who just didn't know how to ask a question, sometimes I would get into the fray, so to speak, and ask the witness a question. My own feeling is that judges should be more than a pure referee and that you're interested in seeing that justice is done. Of course, within limits you can't necessarily decide where justice is between two parties, but I always hated to see a case in which one lawyer so far outclassed the other that it could create a bad result. But I don't have that pessimism about the ability of lawyers, because I think it comes with time and that most of the lawyers coming into court are fairly well prepared.

C. Affordability of Legal Services

Doyle: Do you think legal services are more affordable today than they were in the past?

Jefferson: Well, let me start on this question of legal services and how affordable they are by pointing to a saying that sometimes exists and maybe refers especially to criminal cases. There are two classes of citizens or people in the community who get the best legal services. One is the very rich who can obviously hire the most skilled of lawyers, and the other, the poor, who have nothing and who will be represented by attorneys in the Public Defenders' office who are highly qualified. The ones in between who have a little money must hire, you might say, the lawyer on the fringe who is in his first case or maybe doesn't practice criminal law but has taken the case in order to try to develop it. It's that class of persons, those with just a little money, who are in the worst fix.

I'm not too sure of the answers to whether legal services are less affordable than they were before. Of course, legal fees have gone up like everything else. I suppose when it comes to legal services, we're not quite like the medical field where Medicare will pay for the person who can't afford to get medical services. And yet, we don't have that same type of thing with legal services. The public law firms I think are one of the great benefits of our present system and I hated to see and hate to see the budget of the national government cut back on providing funding to the public law firms and legal services to the poor.

Maybe my answer to you is that, well, it could be one of two things: either good legal service is less affordable now so that we have greater need for public service or pro bono work by lawyers, or else in the old days, or former days, perhaps people did not seek out legal services, maybe they simply accepted the results or situations that were unfair or improper or against them and simply did not even try to do anything about it. I'm not sure of what the true situation is. My incliniation, however, is to say that—like with this malpractice situation—people just now are not willing to sit by and say, "Well, this is just my bad luck." They're going to try their best to get legal redress. Yet there are many poor people who simply haven't the money to hire lawyers and the only way to get legal services is through public spirited law firms or pro bono work or the firms that are set up and somehow finance and render services to people who need service and can't afford it.

Doyle: One of the big issues with the bar today is whether an attorney as part of his oath is required to take on a certain percentage of pro bono cases. Some attorneys have referred to it as involuntary servitude. What's your thought on requiring attorneys as part of their license to take on a small percentage of pro bono cases?

Jefferson: My own feeling is that lawyers ought to take on pro bono work. I think it's unfortunate that we have to ask a question, "Should lawyers be forced to do so?" It just seems to me that every lawyer ought to consider it a privilege that he has to become a lawyer, to be a lawyer, and to perform the services which lawyers perform. So it seems to me that we ought not have to say there ought to be a rule of court, for example, that if you're going to become a lawyer, then you're going to have to agree to do a certain amount of pro bono work. I think it ought to be expected, and I for one would urge that it be a part of one's duty in becoming a lawyer—that if you are not willing to do a minimum amount of pro bono work, then you ought not to be in the field of law.

That's not a popular view, I know. Lawyers say, "Well, let those do pro bono work who want to and not insist that others do it." But, for example, the lawyers who take appellate court work and get on the list to do cases do get paid a minimum sum, but I've always taken the view that there should be no attempt by the courts to pay the going rate. To me, that's a part of really pro bono work. And when lawyers take on assignments to write briefs at the appellate level, they should look upon it as part of a pro bono activity. But I know there are many lawyers who take an opposite view and say, "Well, that's the same as if you want to do church work or any other form of public work, work with hospitals or a charitable organization. You should be free to do it if you want to, and if

you don't want to do it, you should not be required." But I just feel that the law should be considered such a high calling and [that it is] a privilege to be a lawyer that it ought to be part of the expectation, and if one doesn't want to do that, then he should choose another profession.

Doyle: What advice do you give to students who are entering law school?

Jefferson: One of the things, of course, I always try to stress upon students is the exacting nature of lawyering, that they ought not to be going into it unless they are prepared to do a lifetime of studying. Law is always changing, and as a matter of fact, it's a lawyer's duty to try to make changes in the law and therefore it requires a rigorous attitude of mind to continue to study all throughout their legal career.

I also try to point out what I've just been talking about—the pro bono aspects of law—that I hope they're not going into law solely because it's a good money making profession. Their attitude should be that law is the very foundation of our society. The only way we can function is through a good legal system that seeks to protect the rights of one citizen against another, the rights of one citizen against the government, and they're doing a service to the community to the extent that they become proficient in law and ought to be willing to help irrespective of the amount of money they're going to get. I try to tell students, for example, if they see a good case that develops a good point of law, they shouldn't think in terms of, "Well, I can't spend a hundred hours on this case, because the client can only pay me for ten hours." But if that case represents a good legal principle that needs to be established, then they should be prepared to do the amount of work that is necessary. But I sometimes think maybe that goes in one ear and out the other.

D. Views on Litigation in American Society

Doyle: We discussed the fact that the populace is becoming more critical of the services that they receive and are seeking redress more often. Do you think, as many people have commented, that we are becoming or are a litigious society?

Jefferson: There is no doubt in my mind that our society believes in litigation. But I don't criticize that. The so-called adversary system that we have by which disputes are determined, I think is essential. It's the one way results happen. If you go back to the civil rights movement, back during the times when Rosa Parks refused to move from the front of the bus to the back, now she knew what that was going to mean—that she could be arrested—but she was prepared at that time to test the system. And that's the only way, it seems to me, that you can—I shouldn't

say the only way—but it's one way we get progress through people being willing to test the system and to sue in order to test it.

I don't mean to say that litigation is the only method; conciliation and mediation are also means of solving disputes, but it seems to me, where people believe they have certain rights, that the best way to advance them is a lawsuit in which each side puts forth its views, and then you have a judicial determination of which is the correct view of the law. If you don't have a society that wants to litigate matters, then I think you just go along with the laws which might be harmful, laws which might be unconstitutional. If people don't sue to test the law—is that a good society where people are afraid to test out what their rights are? Now, some say that we carry it to the extreme and people are too quick to say, "Well, if you don't see it my way, all right, then you'll hear from my lawyer," or "I'll meet you in court," in an effort to browbeat the other side into submission, perhaps.

But I think it's a good thing that we do believe in litigation. I think medicine has advanced more because of that. Once doctors knew that they could be sued for malpractice, I think it has meant that doctors and hospitals are using and have used a lot more care in the way they handle cases and the way they explain things to patients. So that I think it has raised the standard of medical care and I think the fact that lawyers are now more subject to malpractice suits tends to raise the level of competence.

The average lawyer, for example, at one time would decide that he would take any kind of case. If somebody brought him a very complex civil matter that dealt with government regulations or dealt with tax law, or corporate law, he would not worry that he didn't know too much. He'd say, "Well, I can study a little bit." But now, I think, no lawyer is going to take any complex case unless he begins to get some advice from, say, the expert.

Just the other day I was talking with a lawyer about taxation and he was saying, "Well, when I went to law school I didn't take anything about taxes." And I said, "I didn't take it either, because I didn't feel that I was going to need to know too much about income tax and other things." But then the lawyer said, "You know, it's a different story now because now even in divorce cases if you're working out a settlement, you're going to have to think in terms of what are the tax consequences to your client if you agree to a particular settlement. And if you don't know that, and you go ahead and make a settlement without it, and lo and behold, the client then goes to another lawyer and says, 'Look, shouldn't my lawyer have known that, by going with this method, how

much more taxes I'm going to have to pay?' " And here comes a possible suit for malpractice. But what that does is make or should make every lawyer be on his toes. Have I considered all the ramifications when I give this particular type of advice? Whereas it used to be, well, if things didn't work out the client's going to say, "Well, it's just too bad." Like a doctor would say, "Too bad, the operation was successful but the patient died."

Doyle: In your experience as a judge, do you think there really is a serious problem, as [former] Chief Justice Burger has recently alluded to, of the so-called frivolous lawsuit in America?[37]

Jefferson: No, that's another one of his views that I strenuously oppose and with which I disagree. It's true that there are certain frivolous lawsuits, but again there are many lawsuits that one might start out by saying it's frivolous when it turns out not to be. And that gets us into the whole concept of the doctrine of stare decisis. A lot depends on how you define what's a frivolous lawsuit. If a frivolous lawsuit is said to be one that you know that you don't have a leg to stand on, then if you bring such a lawsuit, you can be accused of bringing a frivolous lawsuit. I dare say that going back historically where the Supreme Court of the United States had said on a number of occasions, "Separate but equal is all that the Constitution requires,"[38] so therefore the southern states can set up two separate systems of education and that's the law. If someone considers that an incorrect interpretation of the Constitution, and challenges that interpretation in court, he could be criticized for filing a "frivolous lawsuit." However, that so-called frivolous lawsuit can change the law. For example, opponents of the separate but equal doctrine kept hammering away at it and finally in *Brown v. Board of Education*,[39] it got knocked out.

But that's just one of many examples. I think that the reason [former] Chief Justice Burger is saying that there are too many frivolous lawsuits is that he just hates to see the status quo questioned. I don't care what that status quo is; he hates to see it questioned, he hates to see the courts flooded with litigation. It'd be all nice if we didn't have to have lawsuits but if a person feels that his rights are being invaded, then the only way to test it is to bring a lawsuit.

37. *See* Burger, *Time to Review Our Reliance on the Adversary System: Chief Justice Faults Lawyers for Frivolous Suits, Discovery Abuse*, L.A. Daily J., Feb. 15, 1984, at 4, col. 3 (address at ABA midyear meeting, Las Vegas).

38. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

39. 347 U.S. 483 (1954).

Now, I'll take several types of cases that some people consider frivolous. In Los Angeles we had this restaurant—it was in all the papers—a man had a number of booths and they had booths that had curtains and he set it up for intimacy for couples. And here one evening two lesbians came in and made a reservation in one of the booths, and he said, "No, this has to be for couples not of the same sex, so you can't have one of these booths." So, of course, a lawsuit developed.[40]

The restaurant was sued on the grounds that that was a violation of equal rights, and the plaintiffs prevailed. Now a lot of people would say that there shouldn't be any lawsuit over an issue like that.

I remember another one which was at Ojai, I believe. I remember that because the Academy of Appellate Court Lawyers had its meetings then so I was there for a couple of occasions. I don't remember the details now, but the rule was that gentlemen must wear a tie and coat. So this fellow came and he was dressed without a tie and coat, but I think he had on a matching pants and coat with a sports shirt, but no tie. He said, "One is not supposed to wear a tie with this outfit." They said, "Sorry." He said, "Well, you're not making women wear any ties; they come in wearing dresses or pantsuits." So he sued.[41] Well, he won. I see absolutely nothing wrong with that because to me whether it's a child suing through its parents because of some school regulation as to dress codes, that's the only way you test the legality. To me, if a person feels that a practice needs changing because it's illegal, then he's entitled to sue. Sometimes he can be wrong, but half of the people are always wrong in a lawsuit. Are you going to say that all lawsuits are frivolous because everybody can't win? That's the Burger approach, and I for one feel that that's what the court system exists for.

I just don't think there are too many frivolous lawsuits; there can be some if by frivolous you mean that looking at aspects of the case, you don't have what you might say a reasonable basis for thinking that you've got a legal position. If a lawyer takes a lawsuit just because he wants to earn some money and to win a fee, and really has no leg to stand on—doesn't have even a colorable theory—well maybe you can call that frivolous, but there aren't too many frivolous lawsuits. What I dislike about Burger's statement is that what he tends to be saying is to discourage people from filing lawsuits that somebody hasn't got a precedent already for it. I hope his views don't scare off lawyers who want to file lawsuits because they believe that there's a fundamental right that they're seeking to enforce.

40. Rolon v. Kulwitzky, 153 Cal. App. 3d 289, 200 Cal. Rptr. 217 (1984).
41. Hales v. Ojai Valley Inn Country Club, 73 Cal. App. 3d 25, 140 Cal. Rptr. 555 (1977).

VIII. Observations on Juries

Doyle: There's been a lot of criticism of the jury system. What are your thoughts and reflections on juries in general?

Jefferson: Over the years I have sat civil more than I have criminal, although I did sit in criminal for a couple of years. All through the years, as far as my own court was concerned, we, when I say we, I'd have a little game with my clerk, with my bailiff, and my court reporter and say, "All right, let's speculate on what this verdict's going to be." And you know, in the great majority of instances the jury came out the way we expected. And I've heard other judges say the same thing: that for the most part the juries have not gone awry in terms of being way off from their verdicts.

One of the interesting things about this is that in many instances we have to talk with the jurors afterwards. I would know that they had reached the right decision but by the wrong way. Something would make them decide to go a certain way. And yet if they had considered what I consider to be the things I think they ought to have, they would have reached the same result. But we never know why juries react the way they do. As a matter of fact, they aren't supposed to tell you anyway. The thought processes by which a jury reaches a verdict always is supposed to be kept secret.

But my own feeling is that the jury verdicts are right in ninety to ninety-five percent of the cases. It's only a rare case that I think the jury goes haywire, that a lawyer is able to sell a jury on a bill of goods that does not constitute the right track and the right decision.

The major criticisms, if you're going to criticize the jury system, would be in two or three areas. One area would be in the length of time that it takes to select a jury. Lawyers love to be able to take all kinds of time in voir diring a jury with the idea in mind that they use that to educate the jury as to their side of the case. Now that isn't what it's for, but that's what happens. Or to provide a good basis for the exercise of peremptory challenges to [remove] the ones they think are going to be against them. I have believed that the system of the federal courts is certainly preferable to the state in terms of the speed in which you can get a jury selected because they, the federal judges, do their own questioning of the juries, prospective jurors, and the lawyers are simply not given that opportunity. The state lawyers will say, "Well, we don't like the federal system at all because that doesn't give us a chance to become acquainted with the jury." But my answer is that you do not need to get acquainted with the jury. Once that jury is selected, they are supposed to hear the case and decide it on the facts, not on the lawyer who tries to get

them preconditioned by those questions. So I think that is a major criticism of the state practice of permitting the voir dire of the jury to a great extent by lawyers.

The other is perhaps that we have too many peremptories. You cut down on the peremptory challenges, and that would help you get a jury selected faster.

One other [area] that I have thought about and advocated, but there's very little support for it, [is to] change the number. In civil cases there's no reason why we should have to have a jury of twelve people. Even in criminal cases—and this, you might say, is really hitting at the heart of defense lawyers—for minor cases we can have a number less than twelve. For misdemeanors, for example, there's no reason why we couldn't have a jury of six or seven. Legally, that could be done, and you could even change—in criminal cases, you could get a verdict for less than the full majority. Oregon, for example, in its major felonies, has twelve jurors, but they can get a verdict by ten.

Now those are suggestions that certainly would speed up trials. But try and get something like that through the legislature. The large number of lawyers—and I don't blame lawyers as such—if they feel they work better if they have twelve jurors with all of the peremptories in civil cases and in criminal, too, then it's a matter of a personal feeling. But again, I have said to lawyers at times, "Now, the public can get fed up with what we do and maybe one of these days they will get fed up with the length of time it takes to select juries and with the number of twelve and maybe we'll get an initiative through that nobody will like. Maybe it would be far better, for example, if the legal profession were to think in terms of themselves trying to suggest changes that might speed up the system and still preserve intact the jury system, we'd be better off." But I'm not sure that that does anything but fall on deaf ears.

Doyle: Do you think juries have changed over the last forty years? Have they become more sophisticated?

Jefferson: I think so. One of the reasons, you might say, that people generally become more sophisticated is because of the advent of television where they see news presented. Maybe people don't read as much anymore, but they certainly, by looking at television, get a taste of what's happening in the world. But I think the change is in the makeup of the jury system now, once the U.S. Supreme Court began saying that for a person to have a fair trial, the jury makeup should be of a pretty good cross section of the community, and that no significant segment of the community ought to be arbitrarily refused permission to serve on a

jury.[42] We have started to get a better representation of the community. We have started getting a better cross section of women. Of course, at one time there were no women who served on juries. A conscious effort is now made to pick juries from a system that will give you a pretty good cross section with a good representation of minorities. Take, for example, if you limit the selection of your jury panel to those registered voters, look at the people who are kept off because there are a lot of people who don't register to vote. So you can throw in additional names, such as from the driver's licenses, for example; there are far more people who have driver's licenses than who are registered to vote, so that is a method. And you draw people from other types of lists. The main thing is I think now we get a better cross section. These people will bring to bear upon the determination of what the facts are in a case; they're going to have different experiences and that discussion in the jury room should lead to a better result.

IX. The Judiciary and Judicial Activism

Doyle: Let's discuss the judiciary. Do you think the public really understands the role of the judiciary in our society?

Jefferson: I don't believe that they understand the role as much as they should, and by that I mean they have a lot of misconceptions. Of course, part of the misconception can come from people who dislike decisions that are reached. Maybe, too, the courts have simply not publicized the role of the courts.

For example, I'm not sure that all people realize that a judge is not free to hand down any sentence he desires, that the range of sentencing is tied by the legislature. The legislature decided, and yet the public will say, "Why should this person get only these many years?" as if the courts and the judges had the right to decide that. So there comes a misconception as to what determines how much time a person who's been convicted should get. That's one thing.

Another possible misconception comes from a misunderstanding of what is meant by interpreting the law. Take, for example, if a legislature passes a law, there are those who feel, "Well, why should the courts declare that law unconstitutional?" They do not realize that under the system of the three branches of government—the executive, the legislative, and the judicial—that it was long since determined back by Justice John Marshall of the U.S. Supreme Court that it's the judiciary that must de-

42. *See generally* Peters v. Kiff, 407 U.S. 493, 497 nn. 6-8 (1972) (citing cases where the Court has reversed convictions for failure to have representative grand juries, petit juries, or both).

termine the interpretation of whether legislation is consitutional.[43] Now the Framers didn't have to do it that way. They could have written into the Constitution that each branch of government does what it wants to do and decides whether it's in conformity with the Constitution. But I think that most people would say that then you might as well not have a Constitution. If every law that the legislature passes is constitutional and everything the executive wants to do is constitutional, and there's nobody to put a brake on the actions of the two other branches, then we wouldn't have the kind of democracy that we have. So I think that if people are told, they'll realize the wisdom of the system that permits the judiciary to determine whether legislation is constitutional, and whether action of the government violates the rights of an individual. But people are prone to say that if they don't like decisions the courts make, the judiciary is legislating when all it should be doing is interpreting the law.

I know that there is room for difference of opinion of whether you have an activist court, whether you have a court that says, "We're exercising judicial restraint." But beyond that, it just seems to me that people do not sufficiently understand the role of the court and I think lawyers are subject to some censure for, let's say, not playing a greater role in educating the public as to what is the function of the courts and why, just because they don't like a decision, that doesn't mean that the court is doing something wrong.

Doyle: The California Supreme Court was considered in the time of Chief Justices Traynor and Gibson as perhaps the best state court in the country. Do you believe that it still should be considered one of the leading courts in the United States?

Jefferson: I don't know what is happening much in other courts, so it's pretty difficult to say as to whether it still ought to be considered one of the leading courts in the country. One of the reasons why it was held in such high esteem was that at the time you're talking about, they had Justice Traynor, Justice Tobriner, and Justice Sullivan, for example, and Justice Peters. But those three that I've just mentioned—Traynor, Tobriner, and Sullivan—in my opinion, were legal giants. For example, in the field of tort law many of the dissents written by Traynor over the years became the law of tort, so he was recognized as one of the leaders. Maybe in time, there are those on the bench now who can occupy similar positions, but I'd have to say as of the moment, I don't see that we have any triumverate up there that would match the triumverate that I just spoke about.

43. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

I want it understood that I'm not criticizing the caliber of the present court. I'm simply saying that I don't believe that in terms of their overall influence, that they occupy as preeminent a position as the three that I mentioned. I think it's a good court, there's not any doubt about that; it's a good court now, and maybe it's unfair to try to compare courts in terms of greatness because the ones up there haven't been there that long. Whether or not, for example, the court would have been considered great the moment Traynor got on or Tobriner or Sullivan. Maybe as of that time, we wouldn't have been able to say that court is a great court and a great leader in the country. But certainly as time went on, they were. And I'd say we'd have to give some more years yet to see whether the group we have up there now starting with Chief Justice Rose Bird will be great.[44] Now of course, Stanley Mosk has been a standout over the years and he's still there, but beyond Mosk all of the others really are fairly new when you consider that Otto Kaus, Cruz Reynoso, Alan Broussard, Joseph Grodin and the last one, Malcolm Lucas, they haven't been up there long. There's just no way that you can necessarily predict as to which ones, if any, will become great given a long time.

Doyle: What are your thoughts and reflections on Rose Bird? She has been very heavily criticized.

Jefferson: Well, I think she has been criticized unjustly. I don't think it's justified. I think she's a good scholar, even though she was limited in experience before getting on the bench. If a person dislikes liberal philosophy, then they can dislike Rose Bird because she is pretty consistent in her liberal views, and I happen to be of that same persuasion, so I like what she writes, and I like her opinions. I don't know too much about, you might say, the administration of the court, whether she is subject to some criticism for administration or not.

But I think people just got against her because Brown appointed her chief justice without having the kind of experience that most people would expect the chief justice to have. She obviously didn't come in with the experience of Chief Justice Donald Wright who had been up through the court system. I guess Roger Traynor was put on the bench without judicial experience, but he was there for some time before he was made chief justice. I've forgotten what the background of Chief Justice Gibson was, as to whether he was on the bench first or whether he was on the court of appeal first. I think the criticism was that Brown should have made somebody else chief justice and let her gain some experience, and

44. This interview was conducted prior to the November, 1986 reconfirmation election in which the California voters denied reconfirmation to Chief Justice Rose Bird, and Justices Joseph Grodin and Cruz Reynoso.

maybe she would not have been subjected to the criticism which she had. But certainly a lot of it simply is not justified. She's a very sincere person and there are those who just don't like the way she thinks, and nothing she can do in their eyes would be right anyway. But I think she's a good person for the court.

Doyle: Do you believe the courts have assumed too great a role in making changes in our society, and if they have assumed too great a role, do you think they should cut back and become more conservative?

Jefferson: No, I look at it that it's fortunate that we've had what I would call liberal judges on the U.S. Supreme Court. I would rue the day if we had not had people like Earl Warren, who became Chief Justice. I go back to something that I said before. In the days of Roosevelt, go back to the '30's, McReynolds, Van Devanter, Butler on that U.S. Supreme Court, the doctrine of separate but equal was simply sacred, and if that Court had remained that way, we wouldn't have the end of segregation. But we got judges up there that finally took a different view. A good case was presented, psychological evidence was presented that showed that black children suffered when they were made to go to a school that was all black. They were made to feel that they were inferior, and then the Court finally said, well, this doctrine of separate but equal is in violation of equal protection of the laws.[45]

Now there are people who say whatever the law becomes at one time ought not to be changed; that it should remain that way. One of the major goals of the Constitution is to protect the minority from what you might say are the acts of the majority. If we didn't have a Constitution, Congress could pass a law and say that only white males are going to have the right to vote, the right to do this, the right to own property, females are not going to have any rights, blacks, anyone else. And therefore, you have to look to the Court to interpret the language in such a way that it does what it's designed to do.

Now, I'm a great believer in a Supreme Court decision which a lot of people are against—the decision which safeguarded the right of privacy.[46] Now those words are not in [the Constitution]. But when the Supreme Court looked at the abortion cases[47] and said that a woman's right to privacy should entitle her to have an abortion as a constitutional right, there are those who would say, well, that's judicial activism. But I

45. Brown v. Board of Education, 347 U.S. 483 (1954). *See also supra* note 39 and accompanying text.

46. Griswold v. Connecticut, 381 U.S. 479 (1965).

47. *See* Roe v. Wade, 410 U.S. 113 (1973); *see also* Singleton v. Wulff, 428 U.S. 106 (1976).

don't care what you call it, I say it's interpreting the Constitution. Whenever people say, "Well, that's not in the Constitution. Where do you find it?"—I can't remember the Justice who said, "The Constitution is what we say it is."[48] And it's just that simple—you can interpret language anyway you want to, and they interpret the other literal wording to say that there's still a right of privacy, and that covers a lot of the search and seizure problems. So this business of activism versus, you might say, strict construction, so-called strict construction, in my opinion, is simply another way of saying, "Let's protect the status quo for the majority." That isn't what the Constitution was written for.

Doyle: As far as the California Supreme Court is concerned, can you think of any examples where the court has been judicially active and really benefited the people of California?

Jefferson: Well, I don't consider what has happened judicial activism as such. If you disagree with a decision then you can say it's judicial activism. But I simply construe all that the court has done is to interpret the Constitution the way it should be interpreted.

Let me give you an example—I don't know if you've heard of a case called *Serrano v. Priest*[49]—which I conducted as a trial judge in which a group of parents and children from one of the poorer school districts in the state brought suit to have declared that the method of funding public schools by property taxes in the particular school district was in violation of equal protection of the laws. What was happening was that in a poor school district, there just wasn't enough valuable property to raise much taxes. Only about, say, $600 and something was being spent per child. And yet, you take a rich school district like Beverly Hills, in Los Angeles, they were spending over $2,000 per child. Now that came before me as a trial judge. About the same time that that suit developed, let me say this, the plaintiffs in that lawsuit were charging that not only did it violate the Federal Constitution's Equal Protection Clause, but it violated the state constitution.

Right in the middle of the lawsuit, another lawsuit had been filed in Texas in the federal court and they had exactly the same system.[50] It was

48. "We are under a Constitution, but the Constitution is what the judges say it is . . . ." C.E. Hughes, Speech before the Elmira Chamber of Commerce (May 3, 1907), in ADDRESSES AND PAPERS OF CHARLES EVAN HUGHES, 1906-1908, at 139 (R. Fuller ed. 1903).

49. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977). *See also* Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (upholding attorney fee award based on a "private attorney general" rationale).

50. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

students of a poor district suing the state to force a different basis of funding, and they alleged simply a violation of the Federal Constitution. And right in the midst of my lawsuit, the U.S. Supreme Court said that the plaintiffs were not entitled to win because there was nothing in the U.S. Constitution talking about protecting education as such.[51] Well, the federal government didn't have any fundamental interest in education and a state could in its system of distribution of educational funds permit one district to be poorer than the other. So, lo and behold, when that came up, the defendants, which were the richer school districts, moved, you might say, for summary judgment in my case on the grounds that I had to follow the U.S. Supreme Court in what was called the *Rodriguez* suit. But of course, the California Supreme Court, and this is what, some people would say, had been activist, in the sense that [the justices] had been interpreting language of the state constitution in a different way than the U.S. Supreme Court interprets the same language in the U.S. Constitution. So I simply said that as far as I'm concerned, there are various places in the California Constitution where they talk about education and so that it's of great interest, a fundamental and compelling state interest, and that therefore, this method in California violated the state constitution. Now that was appealed, and the California Supreme Court affirmed my view and so we got a different result from what the people did in Texas.

Now some would say that that's judicial activism and I say, "No, it isn't. It's just simply interpreting the [state] constitution to produce a result which you think is fair. And when you do that, you're no more legislating than if you were to interpret the other way." That's an example of what I consider not activism. To me, I would say that's judicial restraint; you're not making new law, you're interpreting the law.

X. The Exclusionary Rule

A. The Rule

Doyle: The exclusionary rule represents in some people's minds one example of judicial activism. Could you briefly explain what the exclusionary rule[52] is and how it came into existence?

Jefferson: You asked about the exclusionary rule. How did it come into existence? This goes back to a matter of interpretation basically of some of the first ten Amendments of the U.S. Constitution. Specifically, and perhaps the most important, is the Fourth Amendment, which provides

51. *Id.* at 33.

52. *See generally* Weeks v. United States, 232 U.S. 383 (1914).

basically in its language that persons shall be secure in their homes, houses, their persons, their papers, and effects from unreasonable search and seizure.[53] Now that's all that the Fourth Amendment says. It doesn't say what happens if a police officer or any governmental agency violates one's right to be secure in his person and his property from unreasonable search and seizure. But as the U.S. Supreme Court has done on other occasions, the question arose, well, why have a right if you don't have a remedy? What are the remedies if the police officer makes an illegal search and seizure from the person of contraband or evidence of any kind? What is the remedy? Well, it was argued that there are two. One remedy would be to have the individual whose rights have been violated to sue for damages; sue the police officer. Another remedy would be to have a state pass a statute that makes it a crime for an officer to violate one's constitutional rights. I think the Court determined that those remedies were in name only.[54] You're not going to get anywhere trying to sue a police officer for damages, and states are not going to prosecute police officers. So then the Court adopted the rule that in order to have a real remedy that was effective, the remedy would be to exclude evidence that has been illegally obtained.[55] That has been the remedy now for a number of years. There are those, of course, who say that the Constitution doesn't say that and therefore that remedy shouldn't be interpreted to be a constitutional remedy. There are two explanations sometimes given for that remedy of exclusion of evidence illegally obtained. One thought is that it is necessary to deter the police from illegal conduct.[56] I know that if as a policeman, I go out and seize evidence illegally, the evidence is going to be excluded, and I might even lose a conviction. That ought to act as a deterrent for future cases. Another explanation or justification for the exclusionary rule is to protect the integrity of the court.[57] That if the court does not exclude the evidence, it, in effect, is sanctioning illegal conduct by a government official, and the courts ought not to have any part in that. Now that's the justification and that's the theory of the exclusionary rule.

B. The Rule and the Black Community

Doyle: In your experience has the black community had a poor relationship with the police that does in part justify the need for an exclusionary rule?

53. U.S. CONST. amend. IV.
54. *See* Mapp v. Ohio, 367 U.S. 632, 652-53, *reh'g denied*, 368 U.S. 871 (1961).
55. *See* Weeks v. United States, 232 U.S. 383 (1914).
56. *Mapp*, 367 U.S. at 656, 657-58.
57. *Id.* at 659-60.

Jefferson: Well, I think the exclusionary rule is justified in connection with all segments of the community. It hasn't anything to do with the black community. Certainly the black community has had its share of illegal police conduct in the sense of mistreatment at times. But I don't look at the exclusionary rule as necessarily being required because the police will violate the rights of blacks sooner than they'll violate the rights of the majority of the community. What is important, and I think this is what a lot of people don't see, they think in terms of, well, if a person is guilty then he ought to be convicted, irrespective of how the government obtained its evidence. What is wrong with that is if once you indicate to the police that they are free to violate one's rights and seize property at will, what would preclude the police from deciding that too much crime has taken place in a particular neighborhood or they simply don't like the people who live in a certain neighborhood? They then would simply go and break in everybody's door and see what they can find. And if you didn't have an exclusionary rule, that evidence would be admitted, and you might say, "Yes, but that means every person that you get is going to be guilty." But my answer is, "What citizen wants to think or would agree to the idea that since he doesn't have anything, I mean he's not concealing any contraband, that the police ought to be free to force him to open his door and let them search?" I think the average citizen would rise up in horror at that thought, and yet that could be the result if once you say, well, if the police happen to pick on you and find some contraband then you have no remedy.

Doyle: Part of the great debate over the exclusionary rule is the cause and effect that the rule has. This is a twofold question. Do you think that the exclusionary rule, first of all, causes a significant amount of crime? And do you think that the exclusionary rule really has deterred police misconduct?

Jefferson: I don't think the exclusionary rule has caused the commission of crime. I don't see how, by excluding evidence that has been illegally seized, that encourages criminals to conduct their activities and be free from being caught. Statistics indicate that there are very few cases that have been lost because of the exclusionary rule.[58] Every now and then we hear about a defendant who has to go free because the only evidence which the police had was secured illegally. But those are few instances, and those of us who believe in the exclusionary rule would say the great good of the exclusionary rule to the vast majority of citizens is far superior to doing away with the exclusionary rule and thereby saying, well, we won't allow any guilty person to go free.

58. *Cf.* Elkins v. United States, 364 U.S. 206, 218-19 n.8 (1960).

Doyle: Do you think it has deterred police misconduct?
Jefferson: Yes, my own view would be that most police officers, knowing the exclusionary rule—they are given training about what they can and what they cannot do—are not going to deliberately violate one's rights once they know that what they find is not going to be admitted in evidence. They are not going to lose a good case, because if they take their time, chances are that they're going to be able to get a search warrant, an arrest warrant, and therefore get the evidence that they need legally. Actually we've had a decision by the U.S. Supreme Court in 1984 which now, I think, would be of great assistance to the police in seeing that they don't violate the exclusionary rule. For example, the *Leon*[59] case said that if a policeman gets a search warrant from a judge or magistrate, and then the policeman executes the warrant and believes in good faith that he had the right to get the warrant, the evidence seized is going to be admitted even though it has been illegally obtained. Now, of course, that's one of the decisions by which the U.S. Supreme Court has gradually narrowed the exclusionary rule. Because a police officer, it seems to me, can easily say, "I presented in affidavit my facts to the judge. He granted a search warrant; I believe there was probable cause for the granting, probable cause to believe that the person whose home we are searching possessed the contraband." Therefore, that particular type of evidence illegally seized is going to get admitted because of the so-called good faith exception to the exclusionary rule in the case of a search warrant.

XI. Civil Rights and Civil Liberties

Doyle: What was your reaction when *Brown v. Board Of Education*[60] was decided?
Jefferson: I had two reactions. One was—that's a good decision, it's long overdue. But I have one criticism of it. This is where the practical side of the law comes in, and I suppose the Court had to do it. Up to *Brown v. Board of Education*, generally it was said whenever the Court says you have a constitutional right, you have it right then and there. You don't have to wait to get it. But, of course, they used the practicality that creates untold confusion. They said, "All right, separate and equal goes out, but we will [allow] the states that have a separate system [to integrate] 'with all due deliberate speed.' "[61] In other words, here you've got a right, but you can only get it when the state with due delib-

59. United States v. Leon, 468 U.S. 897 (1984).
60. 347 U.S. 483 (1954).
61. Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955).

erate speed grants it to you, and that had never been done before. But as I say, that I didn't like, but at the same time, I can recognize the practicalities of it. But the trouble is that the "due deliberate speed" is still under way, and still hasn't been carried out in certain parts of the South in terms of dismantling the two separate school systems.

But I suppose if any rule of law irked blacks, it was the one that said that you can have separate but equal, because there's just no such thing. When you see in public restrooms, blacks here, whites here, even days when you went on a train, separate parts of the dining room with the curtain was for blacks, *Brown v. Board of Education* was really a signal victory for the civil rights movement.

Doyle: The Reagan Administration has just come out against busing.[62] Do you think we're beginning to regress in that area of civil rights?

Jefferson: Well, I think under the Reagan Administration, yes, we're regressing. There's just no way that he is willing to stand back of the gains made in the civil rights field. Consider the people he's appointed on the Civil Rights Commission. Consider his attitude on the abortion issue. His first appointment to the Supreme Court—Justice Sandra Day O'Conner—the story goes that when Reagan appointed Don Wright as chief justice, he had in mind that he was going to be a good conservative chief justice of the California Supreme Court, and he was mistaken. He was mistaken the same as Eisenhower who appointed Warren as Chief Justice of the U.S. Supreme Court—he was supposed to have said, "Well, that's one of the biggest mistakes that [I] made." But I think that Reagan now is making sure of the conservatism of his appointees. At least he's trying to, and he's succeeded. Justice O'Connor is as conservative as they come, and I don't think she'll change.

What everybody's wondering about in the next four years, suppose [William] Brennan goes off, or suppose [Thurgood] Marshall goes off, then you're not going to have—they're in the minority already—you're not going to have any liberal voice left, because you have a conservative Court now, and little by little they're eating away at the Warren Court's decisions. But they haven't had the nerve to just completely abolish those things, but, of course, you whittle away and for all intents and purposes, you ultimately do away with the decision because you leave so little of it to stand.

62. *See* Norfolk, *Reagan Administration Seeks to End Busing in City's Schools*, L.A. Daily J., Feb. 6, 1985, at 4, col. 3; Reynolds, *Desegregation, Reagan Style: No Busing*, L.A. Daily J., Oct. 26, 1981, at 4, col. 3 (William Bradford Reynolds is currently the Assistant Attorney General for Civil Rights in the Reagan Administration).

For example, the next attack I see is another exception to the exclusionary rule. There is already an exception based on the good faith of the police officer when a warrant has been issued.[63] The next point will be made, well, if the police arrest somebody without a warrant or search without a warrant, and they have a good faith belief that they had a right to do so, that there was an emergency, I think that the present Court might say, "Well, we made the good faith exception when the police officers have a warrant; if they act without a warrant, if they act in good faith, isn't that sufficient?" So I don't look with any—well, I say—any calmness or happiness over what I think is in store for us in the next four years. I hope I'm wrong.

Doyle: Do you think the public really understands the need to protect and promote the Bill of Rights?

Jefferson: No, I don't think they do. I think the average person is merely looking at what is his own personal interest. And his personal interest would say, "Sure, I'd like to live in a crime-free society and somehow the system ought to be able to fix it so no crimes are committed." But how many of them ever start thinking about what is the cause of crime? Is it that we've got the exclusionary rule? Is it that we don't put everybody behind bars who gets caught? I don't think they stop to think, "Well, if you've got a class of citizens who have no jobs, no hope, no opportunity, what have they got to lose when they commit a crime?" You can't put everybody in prison. They don't want to pay the taxes to build new prisons.

I don't think many people realize that if you didn't have the Bill of Rights, you wouldn't have the kind of democratic society that we've got. You might get a President in there that didn't want the Bill of Rights and decide what any autocrat might decide [who has] the army [behind] him. He might do away with rights that any citizen has, and put in martial law, rule by fiat, and decide we won't have any election next time.

People might say, "Well, that can't happen here." Maybe they said the same thing in Germany when Hitler came to power. They said the same thing in Italy when Mussolini came to power; and in the South American countries. In other words, what I'm suggesting is that people ought to be serious enough to say, "Well, there's no such thing that can't happen here." It can happen here if the majority does not support [the] Bill of Rights, the real bulwark of freedom for everybody.

Doyle: You have some background in history, and maybe this kind of lends itself to what we've been talking about. Do you think we've really learned from history or do we just continue to repeat our mistakes?

63. United States v. Leon, 468 U.S. 897 (1984). *See supra* note 59 and accompanying text.

Jefferson: The idea that we may not learn from history, but simply repeat our mistakes is a tough one. I think that sometimes we don't seem to learn from history and yet at other times I think we do. I think we learn somewhat, although the clock seems to be turned back somewhat, I just don't think anybody wants to see the clock turned back completely. It seems to me that nearly everybody would say when a society at least tries to grant recognition to all segments of the population, that it's a better society than it was when we didn't grant such rights. There is more peace in the community. It's not hard to say, for example, why we had all the student riots and uproar in the '60's. And yet I don't think anybody would want to see that happen again. Rioting in the streets, the Watts riots here, Detroit, and elsewhere. I don't believe that people are so unaware that history can repeat itself, that they will let conditions develop to the extent that those things will happen again. I don't know if I've answered your questions. I would like to think that we do learn something from experience although I'm not sure that we learn all that we should.

Doyle: When did you first actively become involved in the civil rights movement?

Jefferson: It was after I came out West to practice law and pretty much the whole time I was practicing law I got connected with the Urban League and that was my major interest—contribution, if you want to call it that—in the field of civil rights.

Doyle: You wrote an article in 1939, entitled, *Race Discrimination in Jury Service.*[64] In that article you stated:

> Had the Supreme Court properly and liberally interpreted the legislation designed to protect the civil rights of the Negro and enforce the guaranties and immunities of the Fourteenth Amendment, there would have been acceptance of the supervisory control of the federal courts over the state judicial system, just as there has been an acceptance of federal judicial control over state legislation. . . . With the narrow construction given to the legislative power of Congress over the fifth section of the Fourteenth Amendment, Negro and other minorities find little solace in the enlargement of individual freedom and equality which the Amendment was supposed to assure. Perhaps some day the Supreme Court will withdraw from its collaboration in the partial nullification of the Fourteenth Amendment and assume a broader view of its protective function. Only then will the constitutional protection of civil rights and liberties cease to be a vain and transitory illusion.[65]

64. Jefferson, *Race Discrimination in Jury Service*, 19 B.U.L. REV. 413 (1939).

65. *Id.* at 447.

How far have we come since you wrote those words over forty-five years ago?

Jefferson: You have referred to an article I wrote in 1939, dealing with discrimination in jury service, and in that law review article, I set forth the position that the U.S. Supreme Court had taken a very narrow view of the Privileges and Immunities Clause of the Fourteenth Amendment. It was my thesis that if they had taken a liberal view of interpreting that section, then what we have now seen as a long and torturous path of simply interpreting the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that process would not have had to take this long path. Without that interpretation, it has taken a long time for the Court to finally give an enlarged meaning to what is meant by due process and what is meant by equal protection of the laws. We have reached a good point in what I was saying back in 1939 of what ought to have been the law then as to the rights of all citizens for equal protection of the laws, but it could have been done so easily if we'd had a liberal Court then that could have taken a different view of what is meant by the Privileges and Immunities Clause. This is the first time since, oh, probably 1940 or 1945, that I've had called to my attention what I said back in 1939. So it's interesting that you dug that up and I can see that I was setting up a pretty liberal view forty years ago. So I would say that I have been true to the course of liberalism.

Doyle: Do you think that the election of Mayor [Thomas] Bradley and other black officials has improved the conditions and perceptions of blacks in the United States?

Jefferson: Yes, it seems to me that the election of black officials in state and city government should have an even greater effect than I think it does have. In other words, it ought to point the way to youngsters coming up to say, "If I struggle hard, there is this opportunity that is open." So they don't have to take the attitude, for example, that I took when I looked at the school system in Los Angeles and said there are no black teachers in the high school, there are no principals, so if I were to become a teacher, to get a Ph.D., M.A., there won't be any chance for me. But here where the black youngster can be told, "Bradley was elected as Mayor of the city not simply because he got black votes. He couldn't have been elected if all he'd gotten were black votes. He got elected because the overall citizens have always felt that he'd make a good Mayor." So with that kind of a role model, if you want to call it that, it seems to me that black youngsters, far more than they do, ought to see that there's an opportunity that has opened up, that people are now beginning to recognize that blacks can do a good job in all aspects of life if they're

prepared, and so get yourself prepared. Go in the path that has now been pointed out to you.

Doyle: You've been on the board of directors of the Welfare Planning Council of the Los Angeles Region and a member of the Los Angeles Area Minority Employment Advisory Council. Do you believe that we can truly have equal rights without some rough economic equality?

Jefferson: The question that's been asked is whether or not we can have true equality if we don't have economic equality. I take it that the concern here is if a segment of the community, let's take the black community, basically is well under the economic progress of the majority, is there any way that you can have any true protection of civil rights? I would say, "No, that you can't, that obtaining some sort of economic equality, at least a better spread of earnings among the black as contrasted with the majority community, would, it would appear to me, to be essential." In other words, even assuming, for example, that we didn't have the tendency toward segregated communities even though it's not commanded by law, it would do no good to have freedom of choice on housing if you have a large segment unable to purchase housing in a decent community. Therefore, without some sort of economic equality you're bound to have effectuated differentials in such things as schooling, because if the blacks haven't the money, then maybe they may be living in a depressed neighborhood. And with that depressed neighborhood goes all of—not all, but a lot of—the ills as to police protection, poor schools, poor community service generally—in the way of parks and general public services—so that somehow the better equalization, I don't mean the absolute equality, but some upward trend and narrowing the spread in economic advantages of the black community would appear to me to be essential if we are to develop decent equality in such things as housing and schools and community services generally.

Doyle: Do you think the law can play a role in achieving that equality?

Jefferson: Yes, certainly the law can try and I suppose has tried, for example, to preclude discrimination. And I think this is something that has to be considered: we're now moving into this doctrine of comparable worth, it's basically being brought by women now who are saying that if you're doing comparable jobs, government's got to pay comparable salaries. And it seems to me that if the law develops that way from the standpoint of governmental jobs, then the next effect is going to be on the private sector, and I think that the private sector will have to follow suit. Of course, you still have a basic problem of better training, better education for the black community, because you cannot expect one who graduates and can hardly read to be able to get a job and to get a decent salary, so that we will still have the problem, it seems to me, of having to some-

how better our school situation, better the family situation, so that blacks will be getting a decent education. I had pointed out earlier, for example, that more money is needed to be put into the community schools in the black neighborhoods so that instead of the usual thirty students to a class, in those schools where they need that additional help you have classes of fifteen.[66] Now, if that doesn't happen, then I cannot see how the educational picture and then the economic picture can really change to any significant extent.

Doyle: Where do you see the civil rights area going from here?

Jefferson: Well, civil rights will be going in the same direction, but people are just going to have to work harder, it seems to me, to try to make gains above where we now are. I look at it and it seems to me we're kind of at a standstill, maybe falling back somewhat, but maybe not, but at least the progress is no longer there as it was, and all I can say is that people who have believed in civil rights for all of our citizens must try to redouble their efforts to see that we just don't—for one thing, that we don't drift backwards—but that we maintain what we have and then still go forward. Now, some things tend to stand still a little bit by virtue of who's in office. I don't think, for example, that [Governor] Deukmejian is going to do much in terms of, say, putting blacks on the bench or in other positions, I just don't think he's going to do that. I think Reagan's the same way. [Jimmy] Carter made a number of federal judge appointments of blacks, that type of thing stands out because it gives people hope. So I think there's that slowdown, so there has to be the constant pressures by people to say, "This movement was good for the country, so regardless of your political persuasion, at least do some things that will keep the flame alive."

Doyle: Put yourself back in the time frame of the mid-to-late 1960's. Back then did you think we would be where we are here today?

Jefferson: In a sense I did, because I saw changes taking place even as I said, going back to where we didn't have all of the decisions, where the Urban League was beginning to have some effect on ordinary jobs such as being a salesperson in a department store or driving a streetcar, or driving a bus—an ordinary job. That they were beginning to say, "Well, it isn't fair to keep blacks out of this type of employment." And I somehow felt that with Martin Luther King developing his philosophy of nonviolence but more or less kind of borrowing from [Mahatma] Gandhi of India—you may do a certain amount of civil disobedience, but be prepared to go to jail for it—that somehow will hit the conscience of people. Then, on the other hand, I'm not one who preaches violence, but maybe

66. *See supra* pp. 234-35.

a combination of nonviolence with some of the violence by—I'm trying to think of some of these groups that finally got put down—I can't remember now what group it was but they had shootouts with third world liberation people, whatever they were called, that even some of that violence, it seems to me gave people an idea: "Well, look, we want a peaceful community, but if you stamp on people and step on them all the time then some violence results. So let's see to it that some advances are made." That combination of circumstances had to bring us where we are. Maybe I didn't know how, but I always, somehow always felt, well, this prejudice just can't last, can't go on. Somehow it's going to get better. I mean, things are going to get better.

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